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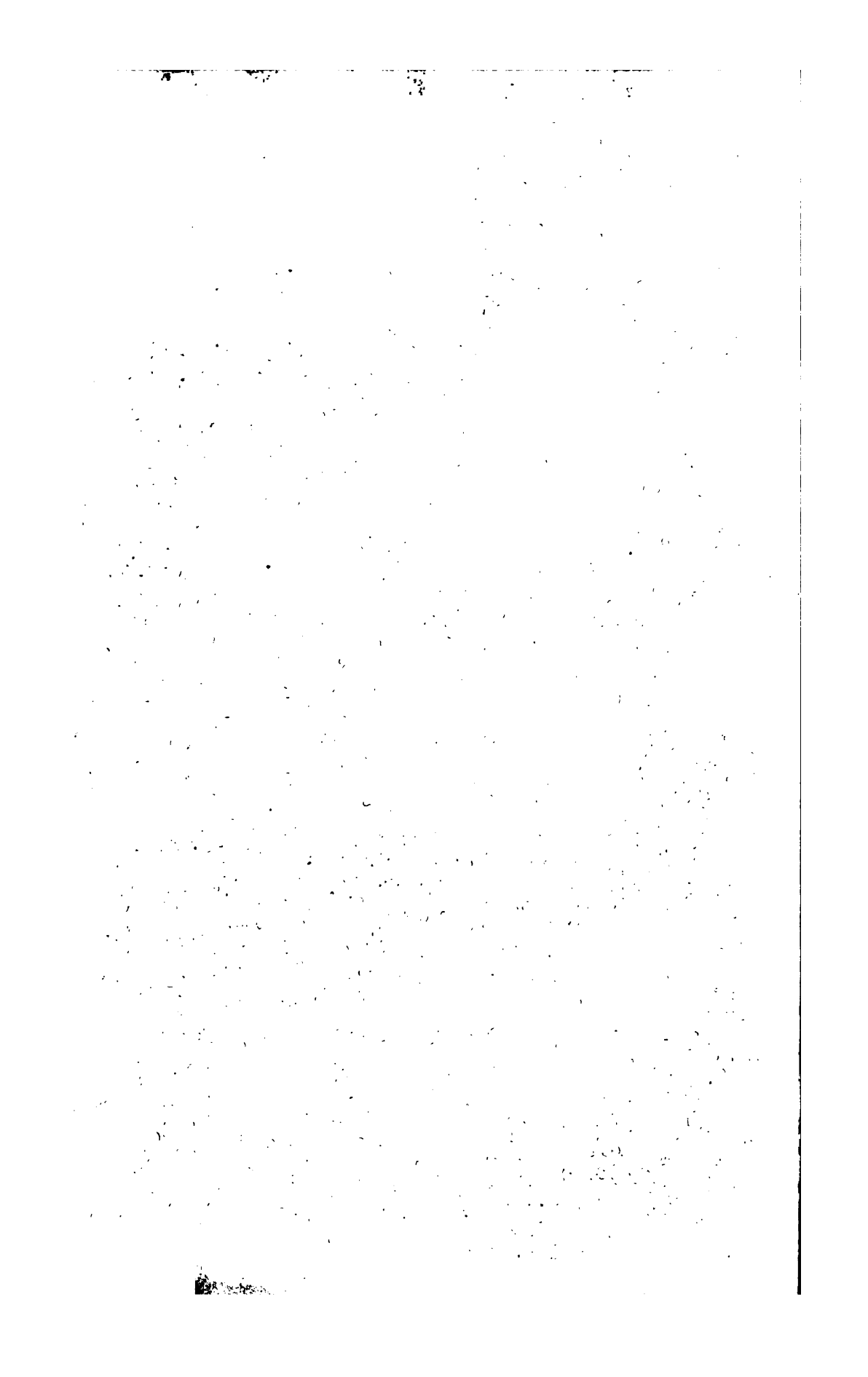

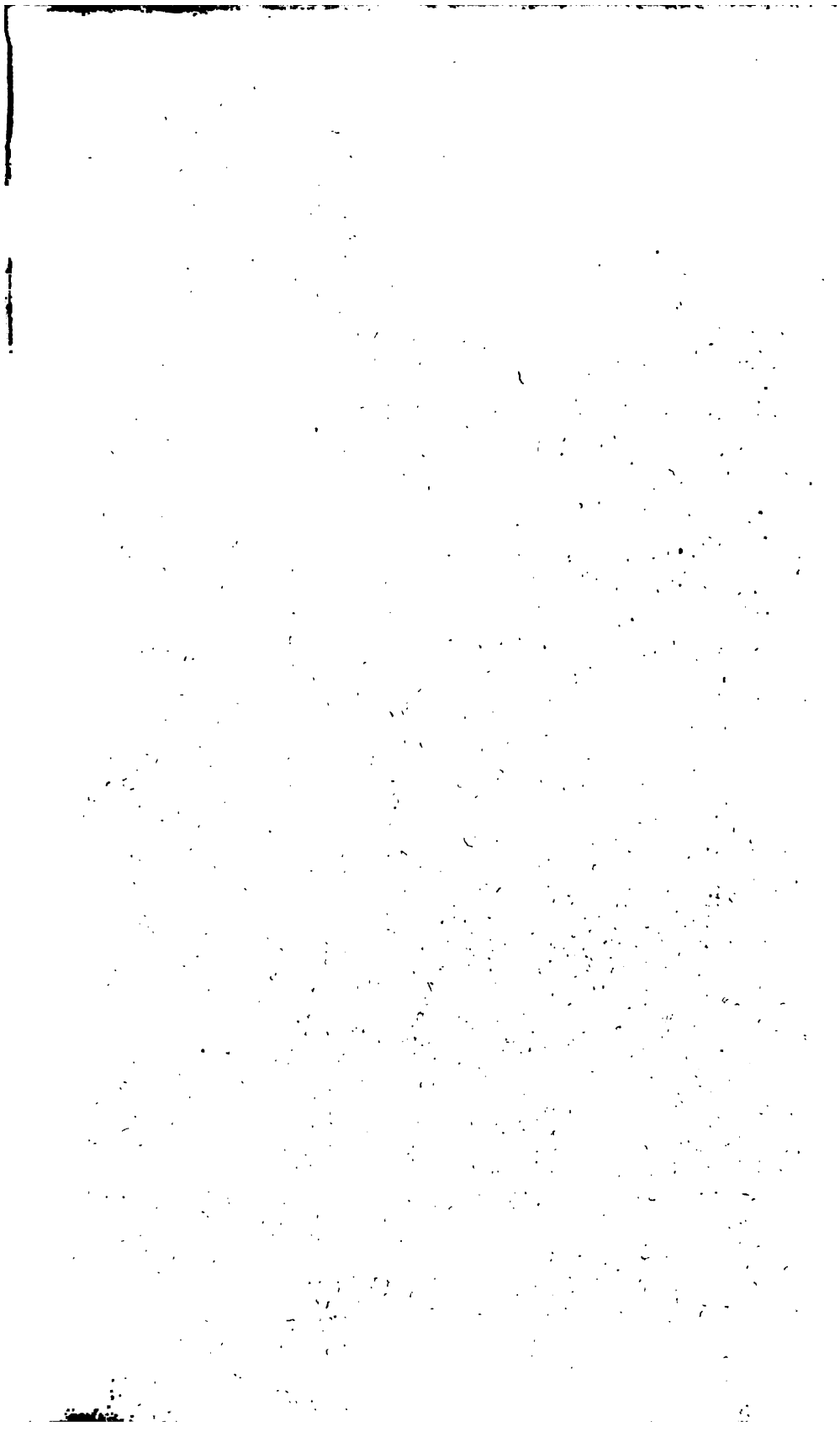

A SUMMARY

OF

PRACTICE

ERRATA:

Page 11, 2d paragraph, strike out, "*of the other side,*" and for "*the*" before *proctor*, the preceding word, read "*his.*"
" 12, 1st " for "*conformably*" read "*conformable.*"
" " 3d " for "*its*" read "*their.*"
" 15, 3d " for "*proctor*" read "*praetor.*"
" 18, 4th " second line, strike out "*respect to.*"
" 21, 3d " for "*if*" read "*of.*"
" " 6th " for "*cases*" read "*causes.*"
" 23, 3d " before "*United States,*" insert "*the.*"
" 24, last " but two, for "*perid*" read "*period.*"
" 25, 4th " "*and the United States in all cases,*" to be included in a parenthesis, ( ), and for Rule "17" read "44."
" 29, 4th " from bottom, between *rem* and *personam*, for "*or*" read "*and.*"
" 42, 4th " for "*depository*" read "*depositary.*"
" 56, last " after *oath* insert "*except by the United States.*"
" 57, " " for "*expressive*" read "*expensive.*"
" 58, 1st " strike out "*them.*"
" " in two last paragraphs for Rule "95" read "96."
" 61, 4th paragraph, for "*therefor*" read "*therefore.*"
" 64, 9th line from bottom, for "*forfeiture*" read "*forfeitures.*"
" 68, last paragraph of Section 11, before "*parties*" insert "*such.*"
" 70, 4th " for "*order*" read "*manner.*"
" 86, 6th line from bottom, for "*notice*" read "*motion.*"
" 88, 3d " " for "*in*" read "*into.*"
" 89, 6th line from top, strike out "*here.*"
" 93, 3d line from bottom for "*diroct*" read "*direct.*"
" 94, 8th line from top for "*all*" read "*and.*"
" 102, 5th paragraph, for "*bills*" read "*libels.*"
" 103, 5th " after *intendment* insert "*came to be.*"
" 110, 5th line from top, transpose "*below*" so as to be the first word in the line.
" 113, 8th line from top for "*action*" read "*act,*" and 10th line, for "*they*" read "*it.*"
" 116, 3d line from bottom, for "*upon*" read "*up on.*"
" 119, 5th paragraph, before "*employed*" insert "*ordinarily.*"
" 120, last line but one, for "*and*" read "*which.*"

A SUMMARY

OF

PRACTICE

IN

INSTANCE, REVENUE AND PRIZE CAUSES,

IN THE

ADMIRALTY COURTS OF THE UNITED STATES,

FOR THE

SOUTHERN DISTRICT OF NEW-YORK;

AND ALSO ON

APPEAL TO THE SUPREME COURT:

TOGETHER WITH

THE RULES OF THE DISTICT COURT.

BY

SAMUEL R. BETTS,

JUDGE OF THE DISTRICT COURT.

NEW-YORK:

HALSTED AND VOORHIES,

Corner of Nassau and Cedar Streets.

1838.

Wm. Osborn, Printer, 88 William-street.

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INTRODUCTION.

Some years since the author commenced the preparation of a Treatise on the Admiralty Practice of the United States' Courts in this District, embracing Proceedings in Prize and Revenue Causes.

Circumstances of an official and domestic character delayed the completion of the work, and it having become necessary to republish the Rules of Court, applications were made the author that the Treatise might be finished and published cotemporaneously with the Rules.

His other engagements prevented a compliance with this request, but as the Rules were about going to press, he yielded to the suggestion that a Summary or Abstract should be made of the work so far as prepared and be given the profession with the Rules. He has bestowed all the attention the short period and urgency of the case would admit on the preparation of such Abridgement, and in order that the Rules might be ready for the bar early after the summer vacation, the sections of the text were handed the printer as rapidly as they could be struck off and have gone through the press *pari passu* with the Rules.

This circumstance of haste is not adverted to as any excuse for essential errors in matter or manner, but it may in a degree apologize for an occasional clumsy sentence or turn of expression, or the repetition under different sections of the same matters.

In this connection it may be remarked that the quotation of the District Court Rules is made from the copy in manuscript, which had, in the course of compilation, been subjected to numerous alterations, transpositions and renumberings, and that the printed numbering does not, therefore, throughout correspond with the written copy.

In reading the proof sheets it has been attempted to correct the references so as to designate the printed rules, but undoubtedly many inaccuracies may have escaped notice, and the number given will often be found to have no relation to the point to which it is cited.

The rule intended, in such case, will generally be found within two or three from that indicated.

The purpose of this Summary is to present to the profession in a concise and familiar form, the principles of practice appertaining to the admiralty courts of this district; and the hope is indulged that it will be found a convenient and useful directory to those unskilled in the proceedings of these courts. Experienced practitioners may also derive advantages in having rules and principles brought together and classified, which heretofore, they have been compelled to gather from the usages of the courts or search out in the numerous books regarded as authoritative on the subject.

The admiralty court of each district will probably be found employing a course of procedure in a degree peculiar to itself, and it cannot therefore be expected that the practice of any one will be entirely applicable to the others or be received as authority by them.

Still the assimilation of proceedings is such, that the practice of the courts of this District may have an interest and influence with others of like jurisdiction, particularly from the consideration that few have probably maintained a closer adherence to the course of the civil law, and none have possessed opportunities for more frequent and diversified application of its rules, than the courts of New-York.

The civil law is recognised as the common depository from which the maritime courts of christendom derive their doctrines of rights and remedies. That code supplies alike the rule of judging and of preparing matters of contestation for judgment in admiralty tribunals; for the Roman language did not enter more intimately into the composition of the dialects of European nations, than its law connected itself with every system of polity created and administered, wherever the arts and knowledge of that people had once penetrated.

The sea-laws, derived undoubtedly by the Romans through the Greeks from Crete and Tyre, crept along with the progress of commerce and remained most especially, the basis of intercourse and obligation in all matters of trade and navigation, amongst the nations bordering the Hellespont, the Mediterranean, the Baltic, the German and British Seas.

These maritime laws are administered to this day in the tribunals of Italy, Spain, France, Holland, the North of Germany and Prussia, with substantially the same methods as on their earliest recognition. It is believed a sound survey of facts would demonstrate that the spirit of the civil law had entered not less intimately and authoritatively into the entire body of English jurisprudence, laying the broad foundations of the usages and positive laws obtaining in her courts both as rules of decision and procedure. It may not be easy to discriminate between those infused into the habits and thoughts of the nation, during the Roman domination of three hundred years and coming down to the days of Alfred and Edward III., in a common stream of "*customs of the realm*," and those transferred from the shores of Brittany as appendages of the Norman conquest or domesticated as laws or usages of trade of common obligation with most commercial communities.

But whatever may be the fact in regard to *common law courts*, there is no controversy but that the court of the admiral had its proceedings in conformity to the civil law, from its earliest institution. The judicial functions from the beginning were performed by ecclesiastics, as surrogates of the Lord High Admiral or as commissioners appointed directly by the crown.

The canon courts had long been established under the authority of like incumbents, and were administering the rules and practice of the civil law, with such variations as adapted it to the taste and habits of the times, and these modes of procedure having become thus incorporated with the education and prepossessions of the clergy, would be aptly transferred in full to the admiralty where they also presided.

No important distinction in principle or details existed between the practice of the civil law and that of the canon courts, and the introduction of the laws of Oleron and the ardor for the civil law revived by the recovery of the Pandects at Amalfi, being about cotemporaneous, the great maritime court of the kingdom then, probably, first putting forth the more important branches of its jurisdiction, would most appropriately embrace all these particulars as alike applicable and necessary to the exercise of its full powers. It is not, however, intended on this occasion to enter into the question how far the Roman jurisprudence intermingled with and gave character to that of Great Britain, nor at what period of her juridical history the court of admiralty was established, or what jurisdiction was then imparted to it, or whether its processes were taken directly from the canon courts or originally conformed to those of the civil law.

It is clear that the Admiralty was a court of broad powers in the reign of Richard II., and that for centuries its forms of proceeding have been essentially the same with those of the ecclesiastical forums. It has never attempted to this day to arrange a distinct and independent system of practice of its own, and continues to rely upon that of the ecclesiastical courts for the supply and guide of its proceedings.

The colonial vice admiralties on their establishment in America, would be induced from many considerations to recur to the civil law for their course of procedure in preference to adopting that of the ecclesiastical courts.

They were clothed with powers not exercised by the admiralty of England and corresponding in character with the functions of Roman courts. All matters of a maritime character, embracing criminal offences, personal actions *ex contractu* and *ex delicto*, cases of revenue, prize and their incidents, came within the cognizance of these courts, and they would most naturally in the exercise of these diversified powers, adopt the method of the tribunals after which they were modelled.

Practitioners educated with a view to the business of the

maritime courts made the civil law the subject of closest study.

In England this was necessarily so, for reasons already alluded to, and also because the common law was not recognized as of any authority in those tribunals. It was still more so on the continent, and the Protestant and Huguenot emigrants from Holland and France were not only thoroughly taught in that science in their universities, but they had furthermore been always accustomed to the simple and direct forms of the civil law in the administration of their domestic forums. Moreover, coming as the great mass of the professional men did into America to escape the exactions and domination of ecclesiastical authority at home, their feelings and prejudices would impel them to discard in the processes of the courts with which they connected themselves here, so far as possible, every ingredient of ecclesiastical polity.

That too, it is to be recollected, was an era of reformations, when men's minds were exasperated against church establishments and all secular authority in the clergy. Every thing wearing the habiliments of Popery or Episcopacy, or tending to manifest the control of the clerical order in civil affairs, would be distrusted and avoided. The observances and formalities superadded by the canonical courts to the course of the civil law would thus be marked objects of jealousy, and when not indispensable to the efficient action of the court, would be rejected or suffered to fall into disuse.

The circumstances connected with the organization of the vice admiralty courts would also tend forcibly to the same result. They were not limited to a particular colony. All New-England and New-York were first placed under the jurisdiction of one court: the extent of territory, and the multifarious subjects of jurisdiction falling within the cognizance of each court, would conduce to the adoption of the most simple and expeditious course of practice and the primitive model of the civil law as both most efficient and best known to judges and practitioners, would be most fitly adopted.

The archives of the admiralty in this district for more than seventy years and up to the Revolution, exhibit a striking similitude between its methods of procedure and those of the civil law. Some formalities of the English admiralty common to the canon courts, were employed in the colonial admiralty courts also for a considerable period and passed down to the United States tribunals, but they have been gradually diminishing, until all processes not necessary to the direct and effective action of the court, have, in a great measure disappeared from the practice.

It was manifestly the general acceptation of the profession in this country, at the adoption of the Federal Constitution, that the admiralty courts here were conducting their proceedings in conformity to the principles and rules of the civil law, and that the course of the English admiralty was not an authority or guide in that matter, and such was clearly the understanding of the first congress.

The act of 1790 expressly declared, that the "forms and modes of proceeding in causes of admiralty and maritime jurisdiction, should be according to the course of the civil law."

The subsequent act of 1793, as construed by the supreme court, substitutes for the civil law practice, that of the English admiralty as modified by the usages of our own courts. It is exceedingly questionable whether, except by force of this act of congress, the English practice as a system was even recognised by, or had authority in any one of our admiralty courts. If, however, the suggestions before offered are well founded, the act of congress in effect introduced no change in our system, because the usages of the colonial courts had reinstated and already incorporated the methods of the civil law into our practice, wherever the English court had essentially departed from it. The act moreover gives power to the United States' courts by rule to regulate their own practice, and that authority has usually been exercised in giving celerity and simplicity to their proceedings and freeing them from peculiarities appertaining to the English practice.

In which ever way then the authority is derived, either

mediately through the English admiralty and canonical courts, or directly from the civil code, that law, in reality, supplies the elements and all the essential details of the American admiralty practice.

In preparing the main treatise from which this Summary is extracted, the author has endeavored to present a comprehensive and distinct view of those parts of the civil law procedure, which may be regarded the type or specific model of the processes now employed in maritime courts.

In illustration of the subject recourse has been had to the written codes of practice of the principal maritime countries of Europe, and their affinities to the common source of processes or variance from the English or our own, when material, have been noted.

The decisions of the English court of admiralty, of the colonial court of this district and its usages, and the decisions and stated rules of the different United States' courts, have been carefully examined, so far as these materials were accessible to the author.

In this survey, a body of references and citations has been collected, which it is believed will be found useful to the profession and will strongly support the intimation before hazarded, that the course of practice observed in this country and especially in this district, has maintained a marked conformity to that of the civil law and has harmonized, in all its essential features, with that of the more important maritime nations.

All those references to authorities, except acts of congress and the rules of the supreme, circuit and district courts, are omitted in this Summary. They could not be given without adding also explanations and comments which would have too much increased the bulk of this abstract and have demanded delays which would have interfered with the design of this publication.

Should this work be so favorably received as to justify publishing the main Treatise, it will be speedily completed and offered to the profession.

Although the statements in the text here are not supported

by citations, the lawyer familiar with the civil code and the adjudications and processes of admiralty courts in this country and Europe, will not fail to recognise nearly every position as extracted from authorities of highest influence and most commonly expressed in the language of the books.

At the first sessions of the district court upon its organization under the United States' constitution, Richard Harrison, Richard Varick, John Lawrance, John Cozine, Cornelius J. Bogart and Robert Troup, eminent counsel at the bar, were appointed to prepare and report a system of rules for the government of the practice of this court.

Two of those gentlemen subsequently presided in the court.

It does not appear from the minutes that any report was ever made in respect to the admiralty practice, and except the ordering of an occasional rule and the adoption of the body of English prize rules, no digested code of rules governing admiralty proceedings, were promulged by the court previous to the year 1828.

It was found that the greater familiarity of the profession with common law proceedings, led many practitioners to confound the forms of law courts with those of admiralty, and was productive of constant mistakes and uncertainty.

To obviate these perplexities, a set of rules was adopted by the court and published, in 1828, which were intended to mark the course of proceedings appropriate to admiralty practice. They expressed the ordinary usages of the court, gathered from such previous rules as were found scattered over the minutes through a period of forty years, and also from decisions and intimations of the various United States' courts, as well as from the methods of proceeding exhibited on the files of the colonial vice admiralty from 1701 to the Revolution.

Under a favorable reception from the bar, that system of rules went far towards establishing uniformity and consistency in the proceedings of the court.

Alterations and additions have from time to time been made thereto within the intervening ten years, as the expe-

rience of the court and the exigencies of business indicated their prosperity.

A republication of the rules having now become necessary, advantage has been taken of the occasion to revise the entire system, and to endeavor to designate by plain and distinct directions, every essential proceeding in a cause from its initiation to its full completion.

With the desire of benefitting by the experience of other courts, and also as far as might be easily effected, to produce uniformity in the proceedings of courts exercising the same jurisdiction, endeavors were made at an early day to obtain the rules prevailing in each maritime district of the United States. Although the compilation was delayed a considerable period waiting the advantage of consulting the rules of the other courts, yet possession has not been obtained of any except those of Massachusetts, New-Jersey and Louisiana. Probably no written body of rules has been established in the other districts, or being out of print they are no longer conveniently accessible to the public. Great benefit has been derived from those which have been consulted, and it will probably be discovered on a comparison of the present digest, with the rules obtaining in other maritime districts, that the correspondence in the proceedings of the various courts is already such as to require very little to be done by them mutually to render it entire and complete.

The present code of rules is more amplified than the former and introduces specific regulations on many topics before resting on general usage, or gathered from books but little known to the profession.

Numerous changes have also been made, all conducing to expedite causes and free their preparation for hearing from cumbrous forms and useless charges. The delays either party could interpose are essentially curtailed, and means are supplied each for bringing causes to an immediate termination, and to those proceeded against, for releasing *instanter* the person or property improperly arrested.

To these ends, periods of notices are shortened—the series of formal defaults dispensed with—and a single effective de-

fault given against either party delinquent; all the procrastination of monitions and decretal orders from one step to another in a cause, intermediate the initiation of the suit and final decree, are abolished; and an improvident or unwarrantable use of an attachment, speedily corrected.

No important innovation is, however, intended on the accustomed course of the court, except in regard to petty causes.

Those not exceeding $50 in value are made in reality summary, by rendering proceedings in them correspondent to their character, and by freeing them from all useless delays and expenses. A copy of the Rules is annexed in the Appendix.

The great purpose of the Rules is to obtain simplicity and uniformity in the practice of the court.

The object of the following Treatise is to make plain their application and force, and point out the customs or usages of the court which guide its proceedings when no specific regulation by statute or rule exists.

It will not be concealed that the author was also actuated by a hope that this effort might lead to others of higher influence with the profession, which may in the end produce throughout the United States, in those courts exercising a common jurisdiction, one and the same course of practice.

And trusting that the intimation will not be deemed obtrusive, he will venture to express more distinctly the hope that a work so serviceable to the bar and the business of the courts may yet be received from the eminent jurist whose studies have been most familiar with these topics, and who on the bench and at the head of the distinguished school created by his labors, has evinced the fullest mastery of kindred subjects.

Nor is the subject a trivial one. It demands the handling of a master.

The practice of courts is the means by which the justice of the land is administered.

The fundamental law creates the forum and imparts its capacities. Its practice or mode of procedure gives those

faculties their vitality and usefulness. The wisest laws will fail subserving their good purpose if the ministration of the courts is so arranged and conducted as to apply them imperfectly or inefficiently.

That this element essential to all judicatories, demands the most sagacious and provident direction, has been realized at all periods.

The states of New-York and Louisiana, following illustrious examples furnished by other governments, have applied the most considerate legislation to the subject.

What we can hardly expect from Congress for the benefit of the courts of the United States, we must seek from the learning and experience of our jurists, and some one should be invoked to the task whose name will command from courts and practitioners that confidence which may render the work a common standard in all our maritime tribunals.

And when the celerity of the proceedings and efficiency of the remedies of maritime courts become generally known and appreciated in this country, it is believed their jurisdiction will no longer be restricted to the accident of flux and reflux of tides, but will also be extended to and embrace the commercial navigation of the United States over all their great inland waters.

New-York, November, 1838.

SECTION I.

Proctors and Advocates.

In the early stages of civil procedures parties conducted their own causes, with such aid as the magistrate *ex officio* rendered them, and it was matter of favor to be represented by procurators or attorneys. The rule is now reversed in its application; parties appear of right by attorney, and *in propria persona*, through special permission, either given by rules of court or express statutory enactments.

After a professional order became recognised, the members were prepared for its duties by a training in studies and instructions at once the most exact, and practical, comprehensive and liberal.

The precepts of Aristotle, Quintillian and Cicero, delivered to their pupils 2200 and 1800 years ago, supply at this day most useful and elevated guides to the bar in the study and practice of their profession. An observance of the rules of these great masters in the preparation and arrangement of the business before our tribunals, would most essentially facilitate the despatch and better understanding of causes.

Suits are conducted in admiralty as at common law and in equity, by practitioners licensed by the court, under the denomination of proctors and advocates, names borrowed from the civil law.

Originally the proctor was no more than an attorney in fact or solicitor or procurator, to whom was entrusted the preparation and management of the *facts* of a case. The

advocate took exclusive charge of the *law* of the case and represented the party before the court.

Modern practice has varied and greatly enlarged the functions of the proctor. He has the preparation and control of the proceedings until brought to hearing before the court.

He is usually first consulted by the party, and often institutes the action, draws the pleadings, and puts the cause at issue, before an advocate is employed. When qualified as he should be, he arranges the pleadings, proofs and law of his cases, sitting with the advocate at the trial and becoming a most useful coadjutor to him on the hearing.

The proctor's name must appear upon the writs and pleadings on his side of the cause, and it devolves upon him to have all papers intended for the files accurately drawn and plainly and fairly engrossed. If, as has been too often the case, they are defaced by erasures or interlineations, or not distinctly written, the clerk is prohibited receiving them on the files without a previous *allocatur* of the judge. (Rule 6.) The orders and decrees of the court are usually drawn up by the clerk, yet it is proper that the proctor should submit to him a draft of the decree he claims. So also he may properly lay a draft of the decree he prays for before the court at the hearing.

Skill and care are requisite in drawing these papers, as they may be regarded as pointing out with more exactness than the pleadings or argument the relief sought by the party.

The proctor does not become in our practice *dominus litis* in the full sense of the civil law; but his authority in regard to the suit is in all respects equally ample with that of an attorney in courts of law, with the further privilege that in actions by seamen for wages, the court will not of course sanction settlements of the causes made with parties out of court, unless their proctors are consulted and approve them.

In case such settlement is made without satisfying the proctor's fees, he will be permitted to continue the cause in court and take a decree for his costs, giving the opposite proctor or party written notice that he is proceeding in the cause for the

recovery of costs only. The property under arrest, or the stipulations in court, will not be surrendered until such decree is satisfied.

Whenever the opposite party is entitled to a notice of any proceedings, it must be in writing signed by the proctor and served upon the proctor of the other side.

If a party conducts his own cause, not being a proctor, the services, which must be personal on the proctor, are made on such party, or by affixing the paper or notice in a conspicuous place in the clerk's office.

Proctors of any circuit or district court of the United States, and solicitors of the court of chancery and attorneys of the supreme court of this state, may be admitted proctors in the district court of the southern district of New-York. (Rule 164.)

The admission is obtained by motion to the court made by an advocate of the court, at the same time presenting the license of the applicant for the inspection of the court, or on presentation of such license to the clerk, he will in vacation or out of court in term, enter an order of course for the admission of the proctor, who thereupon subscribes the roll and takes the oath. In case of any deficiency or irregularity in such licenses, the clerk will report the matter to the court before administering the oath and permitting the applicant to subscribe the roll. Applicants may also be admitted upon examination; the rule of the supreme court of the state for the admission of attorneys applying in such case.

After a proctor is duly admitted, his authority is implied by the court in causes in which he appears until the contrary is shown, and no stipulation is required of the party to ratify his acts.

The practice of making the appointment *apud acta*, or before a notary, are both obsolete, and the proctor is now recognised judicially by the court as empowered by his commission to act for another without any formal authorization. A verbal retainer is sufficient.

The pleadings and practice of the court being derived essentially from the civil law, it is important that proctors should study the principles of that code applicable to these

topics. The proceedings of admiralty courts being *quasi* international, based upon a great reciprocity and community of action, it is further incumbent on practitioners in these courts to draw their pleadings and carry on the processes in a cause in a style conformably to principles sanctioned by the civil law.

Simplicity, perspicuity and *directness*, are the leading characteristics in the pleadings and practice inculcated by that law, and admiralty courts experience embarrassing inconveniences from formalities transferred into their proceedings out of the technicalities of the common law.

Accuracy and facility in conducting business in these jurisdictions, are to be acquired only by studying its peculiar rules and usages as contradistinguished from those of courts of law. No practitioner, however expert and learned in common law proceedings, can properly rely upon that skill alone in managing the business of admiralty courts—the assimilation between the procedures of those judicatories resting in fundamental principles chiefly, and the explication and application of these common principles to the general processes of either tribunal being essentially different.

Counsellors of the supreme court and court of chancery of this state, and counsellors and advocates of any of the United States' circuit and district courts, may be admitted advocates in this court in the same manner that proctors are admitted. (Rule 164.)

The advocate represents the party in all proceedings before the court. Motions are made by him, witnesses examined, and he argues to the court upon the law and facts of the case.

It is also his duty to examine carefully the proceedings to be placed on file or to be laid before the court, and see to their being properly framed. The civil law regarded him as directly accountable for every deficiency or impropriety in the proceedings, and the censure of the court was directed against him and not the proctor when called for by irregularities or malpractice in any of the processes in a cause. This responsibility ordinarily in modern practice rests upon the proctor, and as the advocate's name need not necessarily be affixed

to the pleadings, he is considered only accountable for proceedings in presence of the court.

A party may deny the authority of a proctor or advocate to appear for him, or may revoke the authority when regularly given.

This must be done commonly by motion, founded on notice to the proctor or advocate.

Under special circumstances the revocation may be *instanter*, in face of the court, but this will not be allowed unless the necessity is manifest to the court.

The advocate possesses full power over the cause in court. He may withdraw the action; consent to a decree; waive an answer or claim; allow amendments; postpone a hearing; consent to or waive process or relinquish or modify a decree; and, indeed, do every act pertinent to the progress or management of the suit which the party himself might lawfully perform.

But no arrangements between advocates or proctors, or engagement of either in respect to proceedings in a cause, will be regarded by the court, unless in writing. (Circuit Court, Rule 90.)

Proctors and advocates being high officers of the law, with peculiar privileges and influence, duties of a more general bearing than those of fidelity and zeal to their immediate clients are exacted from them.

They may be deprived of their offices for acts most serviceable to their clients, if those acts are in derogation of moral integrity or of the known rules and ordinances of the court.

So also they may be subjected personally to the costs of suits instituted or conducted with a wanton spirit of litigation, or upon causes of action without probable foundation, or if any imposition is attempted upon the court, or deceit or want of good faith practised towards the opposite party.

As seamen may commence suits without giving stipulations, and are usually themselves irresponsible, courts watch sedulously the conduct of their proctors, and prevent them, under the penalty of costs, bringing frivolous or merely experimental actions for seamen.

The civil law not only exacted high attainments and probity from advocates and proctors, but also adopted rigid regulations governing their deportment towards the bench, the bar, and suitors and witnesses in a cause.

No new proctors need be appointed by either party when a cause is appealed. The ecclesiastical practice distinguishes in this respect between appeals from grievances and appeals from final decrees; in the former case the proctors in the cause continuing to conduct the proceedings, but in the latter their offices being determined when the decree is laid, new proxies must be exhibited to carry on or defend the appeal.

A proctor has no authority in our practice to substitute another in his place; and as he is presumed to be appointed in the cause by act of court, a substitute in place or discharge of one acting as proctor, can only be effected by order of court.

His authority over the cause continues until final decree. After that he has no other power than to sue out execution and superintend its due service and completion.

For this purpose he may take all proper proceedings for speeding the marshal or compelling him to pay into court moneys collected, and receive the money out of court in behalf of his client, unless at the instance of the client this latter authority is withdrawn by order of the court.

The proctor cannot, however, after final decree, waive or vacate it or do any act in derogation of his client's rights under the decree, without a special authorization, or the order of court.

When the suit does not abate by the death of a party, the proctor continues connected with it as before, notwithstanding the change of parties.

SECTION II.

Actions.

An action is the means supplied by law through which a party may bring his claim for redress within the cognizance of the court.

Forms of action were established in the Roman law, which contained within themselves a distinct notice of the cause for which prosecuted and could be used accordingly only like the formed actions of the register, when the case fell precisely within the *formula*. When the defendant appeared, the appropriate action was indicated to him by the actor or was prayed for (or impetrated) from the tribunal.

If no action existed adapted to the case, the proctor formed one for the occasion. After the courts had relieved themselves from the niceties of these special forms, actions came to be denominated from the *mode* of remedy they furnished, and the writ or processes which instituted the suit were made to correspond with the general purpose of the action. The act of arrest or citation now always indicates the species or form of remedy intended to be pursued, and unlike the ancient course of the civil law or the practice of common law courts, admiralty does not give the designation from the *cause of action*, but from the character of the *remedy*.

The principal divisions of actions recognised in modern practice, are (1.) Actions *in personam*, and (2.) *In rem*. These again, in regard to the mode of prosecution, fall within two more comprehensive appellations of *plenary* and *summary*.

The distinction in this court between plenary and summary actions, rests upon a point unnoticed in the civil and ecclesiastical practice. There the distinction was in terms rather than reality, as except in the mere form of contestation of suit, it appears that the proceedings in both actions were the same.

The English admiralty denominates all its ordinary actions *summary*, although it does not appear that any important formalities in the ancient plenary suits are dispensed with, or

that causes are advanced with greater celerity than in the earliest history of their jurisprudence.

Plenary actions in this court are those in which the matter in demand exceeds the value of fifty dollars, so that the cause is subject to appeal. The course of procedure in these actions is correspondent to that in the English admiralty and the civil law.

Summary actions embrace all prosecutions for the recovery of fifty dollars or under, and they are free of the delays and particularities attendant upon suits under the other class. (Rule 166, 178.)

Actions *in personam* are those in which an individual is charged personally upon some matter of admiralty and maritime jurisdiction.

Actions *in rem* are prosecuted to enforce a right to things arrested or a maritime privilege or lien, attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party. Actions *in rem* as a general class, comprehend proceedings which also take the name of distinct actions, as (1.) *possessory ;* (2.) *petitory ;* (3) *forfeiture ;* and (4.) *prize.*

Possessory actions are suits appropriate to owners in common of a ship, &c. and are brought for the purpose of obtaining or quieting a possession of the thing, in case of dispute between such part owners.

Petitory or proprietary actions are framed with a view to trying the title to ships, &c. The English admiralty does not however entertain these suits in regard to the title to ships, but they are recognised in the United States as indubitable and convenient modes of exercising the maritime jurisdiction. After the termination of a *possessory suit*, the prevailing party, if the other applies to the court for leave to proceed against it in a petitory suit, will be required to give stipulation to restore the ship, &c.

The more simple and usual mode is for the parties, after the termination of the *possessory* action, in case of disputes as to the right of property, to agree to proceed at once in a petitory suit. If this is refused, a libel is filed and proceeded in as in ordinary cases.

The petitory action is a convenient and speedy mode of deciding the right to property attached in the hands of a third party, and claimed by him as against the party implicated in the suit.

This action might undoubtedly be employed wherever the sole question in controversy, in suits of civil and maritime jurisdiction, is the *right of property* in the subject matter of the suit.

SECTION III.

Libel.

So soon as the rights of the party have been considered, and he is advised that he has good cause of action, and that his case falls within the admiralty and maritime jurisdiction, it is necessary to prepare his *statement* as the foundation of all subsequent proceedings. This representation is termed a libel, and the utmost skill and caution of counsel are requisite in its proper preparation.

In practice it is too commonly drawn up in a vague and incoherent manner—filled with useless verbage, or exaggerations of the libellant's claims or merits, or of the conduct or motives of the defendant.

Pompous diction and strong epithets are out of place in a legal paper designed to obtain the admission of the opposite party to its averments, or to lay before the court the facts which the actor will prove.

If the proctor draws the libel without the aid of counsel, he should keep clearly in view the objects the pleading is to serve, and be careful so to frame it as to spare needless costs, or the delay of seeking amendments to it; and if it is, as it should be, submitted to counsel before going upon the files, his judgment and experience will be most serviceably exercised in keeping this pleading within the principles governing proceedings in courts of civil law.

In the practice of those courts there is no fixed formula

for libels. Each libel is supposed to be an accurate statement of the specific case upon which the court is called to act, and the usage of those courts therefore is to receive it from the party in such form as his own skill or that of his counsel may enable him to give it.

But forms which have been sanctioned by long usage, when not redundant or inapt, may be beneficially adopted, and inexperienced pleaders may better adhere to them, than confide in their own conceptions and attempt original composition in framing so important a pleading.

The parts and arrangement of libels commonly employed are, (1.) The address to the court. (2.) The names and descriptions of parties. (3.) The averments or allegations setting forth the cause of action. (4.) The *conclusion* or prayer for relief and process.

Whatever liberality the court may exercise in respect to mere form or arrangement in respect to these particulars, some of them may be considered so far matters of substance, that omissions or mistakes in regard to them, if not fatal to the suit, often induce serious delays and costs.

(1.) The libel must exhibit a case in respect to subject matters clearly within the jurisdiction of the court, and the parties presenting it must show a right to prosecute in their own names.

Deficiencies on these points may be taken advantage of by exceptive allegations in abatement, or by demurrer, or by motion to dismiss the libel for want of jurisdiction.

Persons competent to sue at common law may be parties libellants, and similar regulations obtain in both forums respecting those disqualified from suing in their own right or name.

Married women prosecute by their husbands, or by *prochein ami*, if his interests and hers are adversary; minors by tutors, or guardians, or *prochein ami;* lunatics, persons *non compos mentis*, &c. by tutor, guardian *ad litem*, or committee; the rights of deceased persons are prosecuted by executors and administrators, and bodies corporate are represented and proceeded against as at common law.

It has been the inclination of this court, upon principles

of comity appropriate to admiralty courts acting in a degree, as they do, in an international capacity, to recognise the *lex situs* of the deceased party not only in regard to the distribution of effects, but also as supplying the title or authority of his representative.

Intimation has accordingly been made that an executor or administrator might sue or defend in this court, upon the rights he represents, by virtue of his appointment under the laws of the residence of his testator or intestate, without taking out a new authorization under the laws of this state.

The point, however, has not been explicitly decided.

An owner of property brought into port as prize, if a citizen of the United States or a neutral, may libel his own property, averring that the property, after arrest, remained in detention without the proper measures being taken to bring it to adjudication.

The like right, from parity of reason, may probably be exercised by owners of property seized in port by officers of the revenue. This form of remedy would not be encouraged, where suits have been commenced on such seizures, as there are more speedy and less expensive methods of obtaining the discharge of the property in such cases.

The parties prosecuting must always be accurately named, and it is well also to set forth their residences, as such statement may avoid motions for further security, because of their non-residence; and in salvage cases, and in suits by seamen for wages, the parties named should allege the prosecution to be for themselves, and in behalf of all others entitled to unite therein, and who may come in and be made parties.

Such junction will be made summarily on petition. (Rules 8, 10.)

(2.) The libel, besides showing a case over which the court may take jurisdiction, must pray a relief which the court is competent to grant; it must also set forth by plain and direct averment, without repetitions or amplification of charges, Rule 1,) every fact important to establish the libellant's right, so that the same may be directly met by the opposing party by admission, denial or avoidance, and more especially because no proof can be given, or decree rendered, not covered by and conformable to the allegations.

Causes of action, however unconnected and dissimilar, may be prosecuted in the same suit in admiralty; such as claims resting in hypothecation or privilege, or arising *ex contractu* or *ex delicto;* but this practice does not permit parties being joined as libellants whose interests do not rest upon a cause of action common to all, nor to be made co-defendants or co-respondents, unless they are subject to a common responsibility in the matter.

When diverse demands are embraced in the same action, the allegations in the libel must apply distinctively to each, and the facts averred sustain every separate cause of action as if it had been prosecuted solely.

The libel may pray general or special relief, and if the answer of any particular party is desired, he must be specifically required to answer under oath. (Rule 3.) There is however no advantage in the special prayer other than conducing to greater precision in the application of proofs and allegations, because the special relief cannot go beyond the case made by the libel, and under the general prayer the decree may be claimed *secundem allegata et probata.* This principle comprehends all the complex and diffusive provisions in the ecclesiastical practice touching the *conclusion* of libels.

If the libel demands process and decrees *in rem* and *in personam* in the same action, the court will, on motion by the respondent, control the proceedings so that no oppression shall be exercised by the use of double process. The libellant may be compelled to elect which remedy he will pursue, or to file an indemnity to the opposite party against all unnecessary costs or damages incurred in retaining both.

If the remedy prayed is *in rem* only, and the proofs and allegations establish a clear case for relief *in personam*, the court will not upon the issue decree *in personam*, but it will retain the cause, and permit the actor, under proper restrictions, to amend his libel and prayer, so that a decree may be taken *in personam.*

The same principle applies to proceedings shaped *in personam*, which should have been *in rem*, although the misapprehension of the remedy will more rarely occur in this form.

A supplemental libel may be filed for the purpose of introducing necessary parties, or new allegations, or a more definite and accurate statement of the subject matter of the suit. (Rule 146.)

New counts may be added after appeal to the circuit court, by leave of that court, in order properly to allege matters pertinent to the suit, omitted or imperfectly set forth below.

This will be allowed notwithstanding the original jurisdiction if the matter be exclusively with the district court.

So also will a supplemental libel be received after the appeal, but if it is filed after testimony closed in prize cases, the new testimony can only be taken to the new allegations. This restriction is not so strictly observed on the instance side of the court.

Supplemental matters and amendments must be connected with the libel, by pertinent references, without recapitulating or restating the original libel. (Rule 7.) The costs of rehearsals unnecessarily made will be imposed on the party creating them.

So also informations are only to refer to, without reciting the statutes or sections of statutes at large, on which the prosecution is founded. (Rule 180.) In prize and revenue cases the libel should designate the property sought to be condemned, and it is the better practice in ordinary actions *in rem*, to specify the particulars against which process of arrest is prayed.

Supplemental libels are sometimes used for the purpose of making others entitled to unite in the suit, co-libellants, (as salvors, sailors claiming wages in the same voyage, &c. &c.,) but as such parties may be introduced by short petitions, (Rules 8, 10,) the unnecessary expense of libels filed for that object would be thrown on the parties filing them.

The general principles applicable to the structure of declarations and indictments at common law, bills in chancery and libels in admiralty, are essentially the same. All spring from a common source in the civil law, the libel being the predecessor and holding strongest affinity with the bill in chancery as reformed in modern practice, yet partaking of requisites prescribed in the other pleadings. Each must be

plain, certain and consistent in its averments, and logical in its conclusion.

In the practice of the canonical courts, with which that of the English admiralty is nearly identical, the libel was drawn out by *articles* and *positions*—the articulate parts putting forth the gravamen of the suit to which proofs were to be directed, and the *positions* performing the office of interrogatories.

The bill in chancery extending this notion was formerly crowded with *stating* parts, and *charging* parts, and *pretending* parts, and then recapitulated the whole in specific interrogatories drawn out with labored minuteness and formality. Modern practice has rescinded those senseless tautologies, and restored the bill to a nearer similitude to the libel of the civil law.

The interrogating clauses originally formed no part of the libel: when the oath of the defendant might be demanded, he was brought before the court and was sworn and examined by the judge on such questions as he chose to propound arising out of the allegations of the libel.

The libel in this court is assimilating itself to its model in the civil law; all repetitions and needless amplification of charges are repudiated. (Rules 1 and 92.)

The interrogating clauses might also be properly dispensed with, and good taste, if not neatness and succinctness in pleading, would well justify discarding *articulating* and *propounding* as affected and useless phraseologies, for the simple averment of facts supplies the whole ground to be proved by the plaintiff, or answered or defended against by the respondent.

The libel must be signed by the proctor. It is not indispensably necessary to have the name of an advocate also, although such additional signature should supply evidence that the libel has been maturely considered and approved by him.

When the libel demands the oath of any other party in answer, it must also be subscribed and sworn, or affirmed to by the party himself. (Rule 4.) The oath of one of several libellants will be sufficient when all have an interest in common in the subject matter of the suit.

When also the libel seeks the arrest of a party, or an attachment *in rem*, it must be sworn to, (Rule 3,) unless filed by the United States, in which case no oath is required. (Rule 3.)

If the libellant is out of the district, and upon other adequate excuse shown, the court will allow the libel to be verified by the oath of the proctor or an attorney in fact. (Rules 4, 93.)

The oath or affirmation must be taken before a judge of United States, the clerk of court, or a commissioner authorized to take depositions to be read in the United States' courts.

The libel may be filed without oath, when only a *citation* or *monition* is prayed. (Rule 5.)

It must be plainly and fairly engrossed, and without erasures or interlineations materially defacing it, or it cannot be received on file, unless an order of the judge allows it. (Rule 6.)

(3.) *Proceedings upon the libel after filed.* When the arrest of the party is desired, and the action is for tort or unliquidated damages, the libel must be presented to the judge, and his mandate obtained directing the sum in which bail shall be taken. (Rule 16.)

So also if the libel prays an attachment against property in possession of third persons. (Rule 28.)

The English admiralty and ecclesiastical courts, permit a party or property to be arrested in the first instance and before a libel offered. The same practice in substance obtains in the common law courts.

The procedure in the civil law was both ways, until a special ordinance directed that the libel should be delivered anterior to or contemporaneously with the arrest, and that the defendant be notified of its contents when arrested.

In this district process emanates from the court correspondent to the libellant's case. The actual practice for a half century was to read the libel in open court, and thereupon pray and receive directions for the appropriate process.

This direct agency of the court has been discontinued

since the revolution, but the principle upon which the usage was founded, yet enters into and influences the practice.

In some cases the judge still considers and determines preliminarily the right of the party to coercive process, and in others subrogates the clerk to that office. And in no instance is the actor permitted to use the process of the court to institute or forward an action at his own discretion, nor without placing on the files a justificatory document. (Rule 2.)

As the libel must necessarily be filed before proceedings can be taken against a party or his property, the ancient course of giving *fide jussores* by the defendant and demanding a libel, is out of use in our practice.

When no order of the judge is filed, the clerk examines carefully the case made by the libel and the prayer of process, and gives the party such process as his libel will justify.

The different writs, and the manner of obtaining them, are pointed out in section 5, (post.)

Although the process issues thus by act of court, yet it is taken out by the actor at his risk and responsibility. Accordingly the opposite party is deprived of no right to question its regularity, or to object to its operation, (Rule 36,) except only in case of seamen's wages, where an attachment issues on the order of the judge or a magistrate upon a summons, pursuant to the act of congress. (Rule 36.)

All process *in rem* is issued without a mandate of the judge, except foreign attachment or in suits for seamen's wages, and it is also in the latter case, when the libel avers that the vessel is about to proceed to sea, and within the perid of ten days.

So may citations or monitions, or any process not seeking the arrest of the party, be issued by the clerk without an order of the judge.

In cases of contract, if the libel states with certainty the nature and amount of the claim, the clerk may also issue an attachment *in personam* for that sum. (Rule 17.)

SECTION IV.

Stipulations by Libellant.

GIVING and perfecting the stipulations demanded in an admiralty cause, is a highly important part of the procedure in that court.

The stipulation has no efficacy in conferring jurisdiction, nor does it waive any right of exception to jurisdiction, but it is a most convenient and efficient instrumentality for protecting the rights of parties and enabling the court to administer speedy and entire justice in the case.

It will be most convenient to treat of stipulations in the order they are demanded in a suit, and accordingly those to be given by the libellant will be considered in this section.

Seamen suing *in rem* in their own right, for wages earned on board an American vessel, and salvors bringing into port the property libelled, and the United States in all cases are excused from stipulating in the first instance. (Rules 17, 45.)

If after the suit is instituted, and the property under attachment, sufficient cause is shown, the court on motion and notice will compel seamen and salvors to execute the ordinary stipulation, or in their default, discharge the property from arrest. (Rule 45.)

The ancient mode of calling upon the libellant by motion or petition to give *fide-jussory* security with his libel, is not practiced in this court. He is not regarded as an actor in court until his libel is filed, and that cannot be received and filed by the clerk, or acted upon, until the requisite stipulation is entered, and accordingly there is no necessity for any proceeding on the part of the respondent to speed or enforce the production of security.

When the libel is prepared the proctor comes with his stipulators, or the stipulation, to the clerk's office; if the stipulation has not been already executed, it is then done.

A register is kept by the clerk in which every stipulation is entered, and that is open to the inspection of all parties concerned. (Rule 43.)

If the libellant resides in the district he must execute the stipulation as principal, with at least one surety also resident in the district. Non-resident parties must supply two sureties. (Rule 59.)

It is not the usage here for the principal to enter into a collateral stipulation to indemnify his *fide-jussores*. Should such indemnity be desired by the sureties, special application would have to be made to the court, which might probably exercise the former jurisdiction in this behalf.

The stipulators generally, however, are satisfied with their common law remedy in case of the default of the principal.

The stipulation may be executed before the judge, the clerk, or his chief clerk or deputy, or a commissioner under a *dedimus potestatem*. (Rule 37.)

At the instance of either party interested or for his own satisfaction and information, the officer may take the oath of sureties as to their residence and sufficiency. (Rule 27.)

Should the officer other than the judge, refuse to receive the stipulators on account of their insufficiency, an appeal from the decision may be made *instanter* to the judge. (Rule 27.)

In actions *in personam*, the stipulation in the first instance is in the sum of one hundred dollars, (Rules 16, 17,) and *in rem* is *two hundred and fifty dollars*. (Rule 44.)

The respondent may, however, on proper cause shown, move the court, giving the proctor of the libellant two days previous notice, that the amount of the stipulation be increased. (Rule 55.)

This motion is usually founded on affidavit that the expenses already incurred exceed the amount of the stipulation and that further costs are to be created.

The like motion may also be made if it is discovered that the sureties are irresponsible, and better security will be ordered. (Rule 55.)

The condition of the stipulation is that the libellant will pay all costs that may be decreed against him in this court or the circuit court in case of appeal, and will also appear in this or the appellate court and answer to interrogatories, if any are propounded by the respondent. (Rule 38.)

There is also an express consent connected with the stipulation, that if the condition is not performed, the court may order execution for the amount against the goods and chattels, lands and tenements of the stipulators. (Rule 59.)

The court having possession of the principal matter, has jurisdiction over all its incidents, and may therefore enforce its decrees against the parties to the security, by direct proceeding;—and as the *fi. fa.* or *vend. exp.* uniformly go against personal and real property, there can be no doubt they would be the process through which the forfeiture of the stipulation would be enforced, although no consent was given to that effect.

But as the proceeding in that case would be attended with the delay of notices and interlocutory orders, there is greater conveniency and simplicity in the practice that puts the stipulation into instant execution on the default or contumacy of the stipulators.

On the rendition of the final decree, the proctor of the respondent takes an order of course, if he moves it, that execution issue upon the stipulation.

Still if there be any just grounds of objection to the payment of the amount, this court will require a formal motion with notice, or may even order the party to bring suit upon the stipulation before any remedy will be awarded.

The stipulation may be dispensed with by order of the court, or modified in amount when the party sues in *forma pauperis*, or on account of his inability to find sureties. (Rules 139, 141.)

The oath of the party himself to his indigence is not sufficient in this case, there must be the deposition of some credible witness in addition, satisfying the court of his inability to comply with the usual stipulations.

By the civil law a poor party was admitted to the *juratory* caution, and upon his oath that he would attend the court and abide its decrees, was excused producing sureties.

Modern practice has not employed this oath, but acts in relief of an indigent suitor by mitigating his bail, or exonerating him wholly from giving it.

SECTION V.

Process and Service.

THE libellant having perfected and filed the requisite stipulation, he is entitled to have the process appropriate to his case, prayed for by the libel, issued by the clerk.

Suits in admiralty are commenced by *citation* or *monition; attachment in personam* and *attachment in rem.* (Rule 13.) These writs may be issued singly, or may all be united in one.

It is the invariable usage of this court to connect a citation in special, or in general, with an attachment *in rem;* and the judge on a proper case shown, may allow both the attachment *in rem* and *in personam* to issue at the same time. (Rule 13) In which case the clerk, at his discretion, may combine both attachments in one writ, or issue two distinct warrants.

The *writ of foreign attachment,* is also classed amongst those with which a suit is commenced. (Rule 13.) And it is sometimes so employed. It is, however, more properly only auxiliary to other process, being used to bring property possessed by third persons, within the control of a suit already in prosecution in court, either *in personam* or *in rem.*

When used in effect as the first process, there being no means of serving any other, it must still always be part of, or issued together with process to be served *in personam.*

The clerk draws up, seals and issues all process. It is never, except in case of subpœnas, delivered out in blank, according to the practice in common law courts, to be filled up and issued by the proctor.

The facts and time, and description of process issued, all appear *apud acta*—being a part of the proceedings of the cause, registered by the clerk in the minutes, equally when he issues the writ of course as when directed by the special order of the judge or in open court.

If a case occurs in which the established process would not be sufficient, the clerk can issue, at the instance of the

party, such as is used in like cases in the supreme court of the state. (Rule 14.)

Ordinarily process is to be tested the day it issues, the fiction of *curia sedente* if necessary to give it regularity, need not refer to stated terms, as every day may be *dies juridicus* in admiralty.

But if a special award of process is made in court, it should regularly take test on the day the order is entered.

Process on libels or informations may be made returnable any day at a stated or special sessions, (Rule 11.); but attachments *in rem* in plenary suits must be served fourteen days before the return day, unless in actions by individual suitors, a shorter time is allowed by the judge. (Rule 46.)

The party suing it out will deliver it to the marshal or the proper officer, with such instructions as the case may require, and it cannot be received on file unless duly returned by the officer to whom directed. (Rule 33.) When the marshal or his deputy, is a party in interest in the cause, the process must be directed to and executed by the sheriff or under sheriff of the city and county of New-York. (Rule 227.)

In cases of contract, when the libel expresses with certainty the nature and amount of the demand, process to arrest the party and hold him to bail may be issued by the clerk without an order of the judge. (Rule 17.)

In such cases the writ must state plainly the cause of action and the amount of the demand. The clerk must also endorse and subscribe on the writ the amount of bail directed to be taken, which must be the sum sworn to be due, with an addition thereto not exceeding one hundred dollars. (Rule 17.) But the clerk cannot issue an attachment *in rem* or *personam*, upon the same libel without an order of the judge. (Rule 13.)

When the attachment issues upon the order of the judge, the amount of bail directed by him shall be endorsed by the clerk on the writ.

A *citation* is issued by the clerk of course, on filing the proper pleading and stipulation. (Rules 15, 17.)

If the citation is returned "*not served*," the libellant by at-

testing to the libel, can then have *instanter*, an attachment *in personam*. (Rule 19.)

When the party cannot be arrested, the plaintiff may make proof of the fact to the judge, and obtain a mandate for an attachment *in rem*, against the defendant's property, to compel his appearance, and can also at his election have inserted therein a clause of foreign attachment. (Rule 25.) The latter issues against the defendant's goods and chattels, and credits and effects in the hands of third persons; but never issues but in connection with an attachment in *personam* also. In both these cases the monition must be special to the owner of the property attached and general to all others, &c. Ordinarily process *in rem*, is issued by the clerk at the instance of the libellant or his proctor, when the proper stipulation is executed and the libel containing proper averments and prayer for such writ, is filed: it not being necessary in our practice to have a previous order of the judge. But no attachment can issue to arrest property in the hands of third parties, nor with a clause of foreign attachment, except upon the allowance of the judge. (Rules 13, 28.)

The order is obtained *ex parte*, upon perusal of the libel, or such other evidence as shall satisfy the judge of the propriety of granting the process.

The proceedings on the part of the United States in suing out the various descriptions of process, are the same as with individual suitors, with the exception that the libel or information need not be sworn to, nor is a stipulation required, to justify the arrest of property or person.

Nor can an attachment issue against a vessel, &c., for seamen's wages, without an order of the judge or a justice of the peace, unless the libel avers that the vessel is about to go to sea, and within ten days.

The writs upon libels or informations, may be made returnable on any day in term, at a stated or special sessions of the court, (Rule 11,) and must be returned on the return day. (Rule 32.)

The special sessions are on Tuesday of each week, except during the period of the stated term. (Rule 12.) And as the

stated terms are the first Tuesday of each month, there will be no more than a week during the year, that these proceedings may not be made returnable.

If the court happens not to be open the day process is returnable, the clerk is to receive and file it as if in open court, and the proceedings thereupon continue over to the first sessions of the court next succeeding, at which time the same steps may be taken as if the process was made returnable that day. (Rule 34.)

This avoids all discontinuance of actions from any accidental failure of a court at an appointed term, and secures to libellants the advantage of prompt progress in the cause so soon as the court is in session, and also protects respondents from all uncertainty or surprise as to the state or disposition of the cause, if not proceeded with on the day designated in the writ.

In actions in *personam* there need be no intervening period between the issuing and return of process, further than is necessary to secure its service: but attachments *in rem* in plenary causes, must run at least fourteen days, unless the judge orders the return within a shorter period, and if the arrest of the person is directed by the same writ, both branches will have the same return day. The time in suits in behalf of the United States on seizures, being fixed by statute cannot be abridged by the judge, and to preserve uniformity in the practice, it is the common usage to have the like time run in private actions.

As the process of the court may be used vindictively or without any adequate cause of action, the most summary relief is afforded a party whose person or property is arrested by means of any improper practice, or where there is a manifest defect of equity.

On application to the judge, properly supported by affidavit, he will grant a mandate that the libellant show cause before him *instanter*, why the attachment should not be vacated. (Rule 36.)

The case of seamen taking out an attachment *in rem*, after

summons and the order of the judge or a magistrate thereupon, is not subject to this summary correction. (Rule 36.)

An attachment *in personam* or citation is served by reading or stating its contents to the defendant and showing it him, when requested. A copy of the citation should also be left with him.

A citation may also be served, by leaving a copy at the defendant's usual residence or place of business.

It should be delivered some person, if any is found there, with instructions to give it the party, but when no person competent to receive it is found, the copy should be so left as to afford the greatest probability of its reaching the party, and the return should state the mode of service.

On the return of either process "*not served,*" the libellant may adopt one of two modes for bringing the defendant into court.

He may move for, and obtain an attachment against the property of the defendant, and have sufficient seized to satisfy the demand, inserting, at his election, in such warrant, a clause of foreign attachment. (Rule 25.)

The property so arrested will be held by the marshal until the defendant perfects his appearance.

Or, in case there is no property, or the libellant prefers, he may proceed after return of citation, by public citation or *citatio viis et modis.*

To apply this procedure to the case where a warrant of arrest is issued, a citation must be taken out accompanying the warrant, or after its return; for it is only in aid of the service of a citation, or to make a service by copy effective, that this practice is used. It is a mode of procedure open to parties, but has so far fallen into desuetude in our courts, as not to require any detail of its requisites here. Parties who wish to resort to it must acquaint themselves with the steps required, by consulting the civil law and ecclesiastical practice.

Attachments *in rem* are served by an actual levy upon the property and taking it into possession. The marshal forthwith puts it in charge of his own keeper, leaving the property where arrested or removing it at his discretion.

If, however, the attachment is accompanied by written instructions defining the sum claimed, he shall arrest only so much property (if it be separable) as shall be sufficient to satisfy that sum with the addition thereto of $250. (Rule 54.)

Connected with this attachment is always a citation or monition, either in general to all persons having any interest in the subject matter, or *in special* to persons therein named. In the last case the service is to be made as before directed; but citations in general may be served by leaving a copy conspicuously affixed at the place where the property is arrested, unless some person is found in possession of the property to whom it can be delivered. When such citation is served by copy, in absence of any one having possession of, or right to the thing attached, it will be of the same effect to support subsequent proceedings as if served personally.

A *foreign attachment* is always attached as part of, or issued in connection with process to be served *in personam*, and is served by arrest of the property specifically designated if the marshal can have access to it.

It was originally designed to bring the party being a foreigner, within the jurisdiction of the court. The Scotch law still employs it in its original import *jurisdictionis fundandæ causa*, though there, as here and in England, proceedings consequent upon the arrest may retain the property arrested, subject to the decree in the suit.

If, however, the *garnishee* will not deliver up the effects to the marshal, or denies the right of the defendant to the property, the attachment is served by leaving a copy with such garnishee, or at his residence or usual place of business. (Rule 30.)

But the libellant may, notwithstanding such opposition of the garnishee or trustee, have an actual arrest of the property on indemnifying the marshal by competent surety against the seizure. (Rule 30.)

Such indemnity is to be furnished in like manner, as that given a sheriff at common law, under similar circumstances.

The libellant may, however, petition or move the court on

the marshal's return, and upon a sufficient cause shown, obtain a peremptory attachment against the effects.

He may also waive all coercive proceedings to perfect the arrest, and on proof satisfactory to the court, that the property held by the garnishee or trustee, actually belongs to the defendant, may proceed to a final decree in the cause, as if it was held in arrest. (Rule 31.)

The service of attachments *in rem* is not completed by the arrest of the property and notice to those holding it, as above pointed out, but because all persons interested therein are entitled to be heard in regard to its ultimate disposition, it is necessary to affix a public notice in the marshal's office, and also publish one in a newspaper admonishing all persons interested of the arrest, and the return day of the attachment when the court, if in session, is to proceed to adjudicate thereupon.

These are notices of fourteen days, except when in suits by individuals, the judge orders a shorter one. (Rule 46.)

Such order is to be obtained before the attachment and monition issue, as the return day must correspond with the time fixed by the judge. The clerk prepares the notice from the libel on file, giving a short statement of its substance, (Rule 46,) and the marshal publishes the notice under his signature, in such public newspaper as is designated by the court, by standing order, for that purpose.

When the suit is in behalf of the United States, the proceedings on service of the various writs is the same as on the part of private suitors, except that in actions *in rem*, a preliminary seizure is made by the collector or other officer of the revenue.

This seizure seems to be regarded, in some of the United States' courts, as performing all the offices of an attachment, and that the collector holds the property under the seizure as an officer of the court, to the same degree the marshal would under an attachment.

The acts of Congress are understood differently here, and the seizure is supposed to have effect only as a legal detention of the property until proceedings are taken in court for its

condemnation, when it is brought under the control of the court by process as in all other cases.

Accordingly, in this court an attachment is sued out against such property and it is arrested by the marshal, and taken into his custody, thereby superseding the detention of the collector.

Practical inconveniences of an embarrassing character, may arise in an attempt by the court to exercise over a collector by its interlocutory and intermediate orders, the authority in constant usage in respect to marshals relative to the sale or surrender of property under arrest, and therefore unless the directions of the statutes are plain and decisive, it would be desirable to avoid such change of the entire course of the courts as would be apt to result from attempting to deal with the collector as an officer of court.

SECTION VI.

Default and Contumacy.

In the ancient practice there was great dilatoriness and complexity in carrying the suit forward to a final decree when the party failed coming into court and taking issue upon the libel, or submitting to the relief claimed.

These proceedings are essentially curtailed and simplified in the present course of the court.

The court endeavors to exercise its power over forms of practice to the end, that a party having a defence to make, may with the utmost facility bring out every objection in law or fact to the libellant's suit, and have the judgment of the court thereon, but when no defence is offered, that the libellant's demand may be passed upon with celerity and without expensive impediments and formalities.

Accordingly all intermediate citations or monitions, to give *fide-jussores*—to receive a libel—to answer the same, &c., &c.,

and also the succession of decrees, *primum, secundum et tertium*, are disused, and on bringing into court and filing on its return day the process issued on the libel with the proper return of its service, the libellant may proceed at once to default the defendant *in personam*, and all parties in interest, *in rem*.

The proctor for the libellant moves that the defendant be called, and the crier makes proclamation for him to appear, or that his default will be entered.

If he does not appear and file his answer, &c., &c., motion is then made that his default be entered, and the clerk thereupon immediately enters a decree against him as for default or contumacy. But one party in admiralty in joint actions or interests cannot be injured by the default or contumacy of another.

If the proceeding is *in rem*, the proclamation is for all persons having any thing to say why the property attached should not be condemned and sold for the benefit of the libellant, to come in and make their allegations in that behalf.

If no one appears, the proctor moves the decree of default and condemnation, and that the matter be referred to the clerk for computation, or that a *venditioni exponas* issue, if no reference is necessary. If any one appears, the decree is entered against all persons, excepting such as appear. When the party appearing does not claim possession of the property, or contest the remedy of the libellant as against it, the decree of condemnation and sale is entered as before, and the proceeds remain in court to abide the final decree between the litigant parties, in regard to the distribution.

The default is entered on a single proclamation and the old formulary of three successive proclamations is now abrogated. (Rule 35.)

The steps formerly taken to give effect to a decree of contumacy are now so far varied and combined that the libellant, so soon as default is entered, may move for and take his final decree, if the case admits it, or if any extraneous facts are yet to be ascertained, he may generally have a reference to the clerk to examine and report such facts.

The court will not make such reference nor permit a final decree *sub silentio*, without being first satisfied from inspection of the libel or having its contents opened by the advocate, that jurisdiction is manifest, and that the relief prayed is appropriate to the case and such as the court properly accords.

The reference to the clerk is made in cases not arising *ex delicto*, where amounts are to be computed upon the principles settled by the decree of the court, and is usually limited to cases of contract, express or implied.

In cases of tort, marine trespass, reclamations of damages as incident to captures as in case of prize, petitory or possessory suits, salvage, collision, &c., &c., the court determines the amount of recovery without any report from the clerk; but in like cases, the matter may be referred to assessors, or experts, at the option of the court, or for proper reasons shown by either party. (Rule 126.)

After default in such cases, the libel and proofs must be submitted to the judge for his examination, before any order of reference or final decree will be given.

The old notion, that a party by neglecting to appear and contest the cause, was to be denounced contumacious, as being guilty of a contempt to the monitions of the court, no longer enters into the principle of the proceedings.

A defendant having allowed himself to be placed, by means of the process, in a situation by personal detention, or the substitute of a stipulation which gives the libellant the security of his person, to meet the decree awarded against him, has fulfilled all that the monition and attachment in actions *in personam* now exact.

His appearance in court, or direct assent to its proceedings, are not necessary to sustain its jurisdiction or aid the remedies it can award, and therefore, there is no contempt or contumacy to be implied, in his not contesting the cause, or entering his appearance.

The party having filed his libel, stating specifically the particulars of his demand, and the defendant being commanded by process of court to inform himself of its contents and

answer it forthwith, if he then neglects giving in any reply, the court proceeds to adjudicate upon the right of the libellant in the most summary manner, not upon the contempt of the defendant, but upon proofs on the part of the libellant supporting his claim, or the implied assent of the defendant to the justness of the demand so presented and stated to him.

In cases of suits for liquidated sums, these proofs are the oath of the libellant to the libel when sworn to, or other evidence satisfactory to the court or clerk; and in case of unliquidated damages, any competent and pertinent testimony verifying the demand.

Defaults *in rem* are followed by an immediate order condemning the property seized and ordering its sale.

The proceeds are brought into court, and the libellant lays before the court or clerk, the evidence establishing the amount of his recovery.

As in actions *in personam*, the libel in like cases may furnish all necessary proof; but it is very often necessary to go into fuller proofs after default.

Witnesses are summoned and the same proceedings had as on contested trials, the advocate of the defendant being allowed to cross examine them, or offer testimony on his part mitigating the recovery.

On reference to the clerk, the proofs offered in court are produced before him, with such other as may be pertinent, to enable him to ascertain and report upon the facts required by the order of reference.

When the report comes in, the libellant moves its confirmation and a final decree, both of which orders pass of course, unless the report is excepted to.

Either party may except to the report, the day it is filed.

This is done by note in writing, stating succinctly and definitely the points of exception, and unless delay is allowed by the court, such exception will be regarded as coming in with the report, and both be heard *instanter*.

There is no necessity for setting the cause down for hearing with notice, upon the clerk's report. Both parties are re-

garded as cognizant of the proceedings before him, and of his decision; and it is, moreover, the right of either party to receive from the clerk, on demanding it, a copy of his report before it is filed.

The report is always to be filed in open court, and a motion to confirm, amend or disallow it, may be made *instanter;* it being the established course in admiralty courts to consider all parties present, whenever their cause may be acted on, and accordingly notices from one party to the other are not requisite to support proceedings, unless expressly directed by the stated rules.

If the libellant neglects to take proceedings upon the report, within four days after the same is filed in court, the respondent may on motion have the libel dismissed for want of due prosecution. (Rule 133.)

So also the respondent or claimant may avail himself of the default of the libellant in not proceeding in the cause with the despatch the course of the court admits, by moving the court that the libel be dismissed. (Rule 134.)

Four days' previous notice of the motion must be given and at the same time, an affidavit or certificate of the clerk showing the state of the proceeding and default of the libellant, must be served to ground the motion. (Rule 135.)

The motion may be made at a special sessions or stated term of the court. (Rules 12, 136.)

Either party will also incur a default by not answering interrogatories propounded by the other, and the libel may be dismissed if the default is by the libellant, or a final decree be had against the respondent as if no defence was made, if the default is on his part. (Rule 100.)

SECTION VII.

Defence and Intervention.

WHEN a party intends contesting the demands of a libel or information, his first step will be to perfect his appearance in court. This is not done as formerly by force of a decree that he appear or be produced, but is effected out of court, and by means of stipulations.

In personam. On his arrest a bail stipulation is given the marshal in the nature of a bail-bond at law in the sum endorsed on the warrant, (Rules 21, 39,) and to have the same effect as if given in open court; (Rule 22 ;) but on the return day of the process the defendant must enter into the ordinary stipulations, in a like amount, unless varied by order of the judge, (Rule 39,) conditioned, to appear and answer in the cause or to interrogatories, whenever required by this court or an appellate court: and to pay all costs that may be decreed against him, and perform and abide all interlocutory or final orders or decrees in the cause, or submit himself to commitment. (Rule 38.)

The party is not compellable to give security for payment of the debt on perfecting his appearance, but only for his personal appearance *in judicio sisti.*

The stipulators or bail to the marshal are only discharged by the due perfecting this stipulation ; a like stipulation must be filed when a defendant comes in to defend, although the first process was a citation and not a warrant.

Parties defending *in forma pauperis* by leave of court, will not be required to give any stipulations. (Rule 141.)

So also indigent suitors, proving to the satisfaction of the court their inability to furnish the usual stipulations, will be allowed to defend on filing such reasonable stipulation as may be ordered. (Rule 143.)

These rules of exemption are merely personal, and do not apply to bonding or releasing property under attachment.

The order of the court exonerating the party, must be obtained by petition or motion on the usual notices.

If the bail stipulation exacted on arrest, is for an unreasonable or improper amount, notice of application to the judge to mitigate it, may be given the libellant *instanter*. (Rule 40.)

The judge decides the motion summarily, and the sum fixed by him will be that for which the stipulation is to be taken.

So also after property is delivered up on stipulation, if good cause can be shown for reducing the amount of the bonds, similar relief will be given in like manner. (Rule 40.)

When the respondent has entered into the usual stipulation, on the return of the warrant, or appears in court and submits himself to commitment, the bail stipulation to the marshal is deemed satisfied. (Rule 24.)

The libellant may proceed against the marshal to compel him to produce the respondent, if the bail stipulation properly perfected is not filed. (Rule 23.)

In rem. A stipulation of similar tenor must be given in the sum of $250, (Rule 44,) and if the property arrested is taken out of court, another stipulation for the appraised or agreed value of that, and to redeliver the property when ordered by the court. (Rule 42.) But the court on petition and proper evidence, will modify the amount of the latter stipulation so as to be no larger than shall be necessary to cover the claim of the libellant. (Rule 39.)

By this stipulation, the parties are bound to bring into court the sum fixed, whenever ordered by the court and notice of such order is given the proctor of the party taking the property out of court. (Rule 42.)

If no proctor is employed, the order to bring in the property becomes final against the party after two days, and the stipulation may then be proceeded upon as forfeited. (Rule 42.)

The court may also at any stage of the cause, upon adequate reasons shown, order the property delivered on bail, restored to the custody of the court. As the bail stipulation

in rem is regarded a mere substitute for the thing itself, any order may be made and enforced against the stipulators, which could be carried into execution against the property.

A non-compliance with this order will subject the party holding the property or having control of it, to attachment for contempt, or if it is out of his power to produce the property, will induce the immediate forfeiture of the stipulation.

So also, if necessary, a new attachment may be sued out to arrest such property, notwithstanding the forfeiture of the stipulation or commitment of parties for contempt in not producing it: A notice or monition being first served on the party withholding the property, to deliver it.

When satisfactory evidence is given the court that the property attached, bears with the libellant *pretium affectionis*, as pictures, jewelry, &c. &c., and that he has a claim of property therein, (whether subject to detention or privilege on the part of the person holding it, or the right of ownership or possession be contested,) such property will not be given up on stipulation, but remain in the custody of the court, or with such indifferent depository as may be designated by the court, until final decree in the cause. This is equivalent to *sequestration* in the civil law and ecclesiastical courts.

Stipulations given by claimants or respondents are with like conditions, and subject to the same procedures, as those given by the libellant, (Ante, Section 4,) except as before pointed out in regard to stipulations on the delivery of property out of court.

In suits on seizures by the United States, the claimant gives stipulation as in ordinary cases—the stipulation being regarded as equivalent to the bond required by act of Congress. (Act. 2, March, 1799, Sec. 89.)

When a party wishes to bond, or give stipulation for property arrested and relieve it from attachment, his first step is to ascertain the amount for which such security must be given. He may always bond immediately on the arrest of property and before the return day of the attachment.

In seizures by the United States, and arrests on claims

equal to the value of the property, the security must cover such value.

The value is then determined by *appraisement* or consent of parties.

The proceedings in the name of the United States and individual suitors, are somewhat variant.

When the property is under seizure by the United States, three appraisers are to be appointed and sworn by the court, by the express provision of the statute. The judge, however, is empowered to act in vacation in this behalf, the same as in open court. (Acts of Cong. March 2, 1799; April 5, 1832.)

If the district attorney, and the claimant or his proctor, are present in court, a motion may be made *instanter* after seizure, and without previous notice, for such appraisement, (Rule 61,) upon which the judge will nominate and qualify the appraisers, unless cause is shown for longer delay. The motion may also be made, on giving the district attorney one day's previous notice in writing. (Rule 60.)

If the proceedings are before the judge in vacation, the collector and district attorney in seizures by the United States, and the party or his counsel in individual actions, must have reasonable notice of the application to bail. (Rule 60.) (Act of 1832.)

When the arrest is at the suit of an individual, any party having an interest in the property attached, may apply to the clerk and have an order entered of course for its appraisement. (Rule 62.)

The clerk will appoint and qualify the appraiser, (Rule 63,) selecting in case of vessels, their tackle, &c., one of the wardens of the port, and in case of merchandise, an appraiser or assistant appraiser of the custom-house. (Rule 64.)

When more than one appraiser is desired by a party, special cause must be shown the judge therefor, who, if the circumstances require it, will direct an order to be entered for the appointment of three by the clerk.

Either party may for adequate cause appeal *instanter* to the judge from the appointment of appraiser or appraisers made by the clerk. (Rule 63.)

In all cases the formal action of the clerk or judge may be

avoided, by filing a written consent of the proctors or parties, that an order for appraisement be entered, and naming the appraiser or appraisers, (Rules 62, 63,) or agreeing upon the value of the thing arrested. Such agreed value will be received as that for which the stipulation is to be taken.

The appraisers being duly sworn, they must one day previous to making the appraisement, affix a notice of the time and place it will be made, in a conspicuous place, where the marshal usually posts his public notices, adjacent to the court rooms; and after the appraisement has been reduced to writing by them, it must be filed in the clerk's office. (Rule 66.)

Ordinarily the parties or proctors are in attendance when the appraiser is sworn, and receive from him direct notice, when he will execute his trust; yet to protect the interest of all who may be entitled to come in, the further public notice is required.

When bail is taken by the clerk in vacation on seizures by the United States, the certificate of the collector to the sufficiency of the security is made full evidence by statute. (Act, April 5, 1832.)

The value of the property being ascertained, and the stipulations perfected, the clerk thereupon enters of course, at the instance of any party in interest, an order that the property attached be delivered up to the claimant. (Rule 69.)

Property under arrest cannot be delivered out of the custody of the court without such order. (Rule 69.)

Heretofore the claimant has been required to pay the officers of the court all costs accrued up to the time the bond is executed; upon the principle that it should not be in the power of parties by arrangements between themselves, or proceedings to which these officers could be no parties, to remove the security for their costs, resulting from the custody of the thing in court.

But inasmuch as there may be losses of such advances, or delays and inconveniences in recovering them in cases where the property seized is ultimately acquitted without the charge of costs to the claimants, the practice is so far varied, that the costs are now to be paid into court, by the party at

whose instance the appraisement is made, to abide the ultimate decision of the court in the cause. (Rule 68.)

When the seizure is by the United States of goods subject to impost or vessels subject to tonnage, the claimant in addition to depositing such costs, must produce to the clerk a certificate of the collector and naval officer, that the duties on such goods, or tonnage on such vessels, have been duly paid or secured, before the order for the delivery of them, can be carried into effect. (Act, March 2, 1799, Sec. 89.)

These are the usual proceedings for obtaining possession of goods and vessels under attachment, but in the more common actions, and those involving small demands, parties may relieve their property, without the delay, expense and difficulty, of giving stipulations.

In all actions for sums certain, particularly seaman's wages, the claimant on paying into court the taxed costs, as in other cases of attachment *in rem*, and also the amount sworn to be due in the libel, together with interest on such demand, from the time it became due, calculated forward to the first day of the stated term next following the return day of the attachment, and the sum of $250 to cover all further costs, may thereupon have an order entered *instanter*, delivering up the property arrested. (Rule 65.)

Or if it is preferred by parties in such cases, to give stipulations and not pay the money into court, the clerk will receive the stipulation to pay such sworn amount with interest, costs, and damages, and thereupon enter an order for restoring the property, the claimant paying into court the costs already accrued, as in other cases on appraisement. (Rule 65.)

Circumstances may occur after property is delivered on bail, which in law or equity should exonerate the stipulators in whole or in part from their responsibility, and in such case application may be made to the court upon the facts *instanter*, on notice to the proctor for the libellant, to discharge or reduce the stipulation. (Rule 40.)

So also if there has been any improper practice in instituting the suit, or there be a palpable defect of equity on the part of the libellant, the party arrested *in personam*, or the

claimant of property attached, may be relieved on summary motion from giving stipulation at all, and may have the arrest of the person, or attachment of property vacated.

Satisfactory evidence must in the first instance be laid before the judge, showing the irregularity, or want of probable cause of action. This as in ordinary cases, may be the affidavit of the party or his proctor. The judge will thereupon issue a mandate for the libellant to show cause *instanter* why the arrest or attachment should not be vacated. (Rule 36.)

The hearing before the judge on the return of this mandate, will be as on ordinary motions, but no other final order will be given than one absolutely vacating the arrest, or else discharging the application.

This proceeding, however, cannot be taken in suits for seamen's wages, where the attachment has issued upon a previous certificate of the judge or a magistrate. (Rule 36.)

When on the arrest of a party, the bail exacted is greater than the case justifies, application may be made *instanter* to the judge, to mitigate the amount. (Rule 40.)

Such incidental proceedings are always on motion. Most commonly when the rules do not designate the mode, an order is first obtained from the judge for the opposite party to show cause, &c. The order usually fixes the time of notice, but if it does not, four days' notice must be given in all cases.

SECTION VIII.

Pleadings or Exceptions.

THE respondent or claimant having perfected his appearance by putting in the requisite stipulations and withdrawn his property, or left it in court to abide the final decree, must next prepare his part of the pleadings.

The libel is not furnished him by the libellant's proctor, and he must accordingly obtain a copy from the clerk's office.

This should be done immediately on service of process, because the libellant is entitled to demand a final decree on the return day of process, unless the proper defence is then interposed.

When the defendant appears by proctor, the clerk makes an entry thereof in the minutes, and no written notice of such appearance need be given to libellant's proctor; being personally in court and delivering his pleading when called in court, being the appropriate notice and the only one which the other party is bound to regard, all proceedings in admiralty being deemed taken *in facie curiæ*.

Whatever defence is interposed must be presented and filed and a copy delivered the libellant's proctor in open court on the return day of the process, unless delay is granted by the court.

Proctors frequently waive their strict rights in this behalf, and as a matter of comity permit the defendant to file his pleadings at some subsequent day; if however the indulgence is denied and application is made to the court, a very sufficient excuse will be exacted before the course of the cause will be interrupted or suspended.

The appearance by a proctor duly entered seems to cure all defects of process, either in its form or service.

An appearance for several partners is *prima facie* binding upon all, though in fact the proctor was appointed or authorized but by one.

The defences which may be taken to actions in this court are essentially the same a party is entitled to at common law and in chancery.

The designation and structure of the pleadings or defences, is left exclusively to the parties, and the court never interferes to select or adjust them in the first instance, as was the course in the early periods of the civil law, and is yet practised in some eminent European tribunals, proceeding according to the principles of that law.

Although in this court a party may dispense with all forms of special pleading, and may embrace all modes of defence

supplied by them, in an answer, yet as it is at his discretion to adopt either practice, it seems proper to notice the various descriptions of special defences in use, and the order of pleading them.

Pleas take the denomination of *exceptions*, or exceptive allegations, and are *peremptory* or *dilatory*; the *peremptory*, barring, destroying, or as it was termed, *perempting* the libellant's suit or cause of action, and the *dilatory* postponing or delaying him.

The dilatory exceptions are pleas in abatement, or demurrers for want of form, (*inepti libelli.*)

These pleas are rarely used in practice, except in the case of a total want of jurisdiction or incapacity of the party to sue, because the court relieves upon the easiest terms from all inadvertencies or defects of form, and never turns a libellant out of court upon an exception to his mode of procedure, when he shows a right to a remedy here; and the matter of costs being at the discretion of the court, it is cautious that expectations of gaining costs or imposing them on the opposite party, shall form no inducement to a sharp and captious practice.

Peremptory exceptions are employed to bring forward any matter of law or fact which bars the libellant's recovery. They are in effect general demurrers or pleas in bar, according to the use of these pleadings at common law. They may be double without leave of the court. (Rule 75.) They were anciently allowed to be put in even after the general issue had been determined against the defendant; but that practice is obsolete.

These pleadings are to be replied to, and so *vicissim* until a point is reached expressly asserted upon the one side and denied upon the other. The subsequent series of exceptions take the appellation of *replications*, *duplications*, *triplications*, *quadruplications*, &c.

Replications, rejoinders, &c., may reply as many matters really distinct as the case supplies, and without leave of the court. (Rule 76.)

All these modes of pleading have gone quietly into disuse

since an answer or claim, properly drawn, may avail a party to the same extent as a special exception, except as to matters of abatement. (Rule 76.)

A general demurrer may be *ore tenus* in open court, before plea or answer filed.

When the proceeding is *in personam*, no party not named in the libel and process can come in to defend against the action.

But suits *in rem* rest upon different principles, and every person having an actual interest in the thing attached, has a right to intervene and be made a party and contest any part, or the whole of the libellant's demand against it.

An interest in the question, or even in the result of the cause, will not entitle a third person to intervene on the instance side of the court, without his having also a subsisting interest in the thing itself. A creditor having a lien or privilege, would possess a sufficient interest to entitle him to intervene.

Underwriters on ships or merchandise wrecked or abandoned, have been regarded as incompetent to make themselves parties until the abandonment has been accepted or the loss assumed.

A master of a ship may however intervene and claim in behalf of absent owners, without having any personal interest in the vessel or cargo; and a foreign consul or commercial agent is allowed to intervene even in behalf of unknown subjects of the government he represents.

His interposition will secure the detention of the property or its proceeds in court, until proper powers are obtained from the owner to receive it, and probably if the law of his country would deliver over property so situated to an American consul, he might be allowed to receive it here, as the rule of reciprocity is strongly favored in maritime courts; and when he is authorized by the laws of his country to collect and receive effects of its subjects or citizens arrested or detained abroad, the tribunals here would recognise such law and deliver the property to him accordingly.

A claim by a public minister or charge d'affaires, may be sanctioned by the court when the seizure of property involves a question of the violation of the territorial jurisdiction of his country.

There would also seem to be an impressive equity in permitting foreign executors and administrators, committees or assignees of estates under insolvent or bankrupt laws, or because of the incompetency of the real owner; as also tutors or guardians of minors, in short all persons having by the *lex situs* of the owner's residence or where the property belongs or is to be distributed, the absolute dominion or power of control over it, to appear upon evidence of such authority, and represent all the rights of an absolute owner in this court.

Such right has not yet however been distinctly recognised in any of the United States' courts of admiralty.

Replications need not be filed to answers without oath taking issues in fact to the allegations of the libel. The respondent will be required, and the libellant will be permitted, each to give testimony in support of their respective allegations, the issue being complete without any replication being filed. (Rule 88.)

But the allegations of a sworn answer responsive to the charges of the libel, will be deemed admitted by the libellant unless within four days from the time the answer is perfected, or from the time allowed to except thereto, he files a replication, or serves on the respondent's proctor a written notice that on the trial proofs will be offered in opposition to the allegations of the answer. (Rule 88.)

Such notice, when given, supersedes the necessity of a replication.

The replication to an answer as to a plea may, in case of urgent importance, be special and double, but ordinarily it should take a single issue upon the allegations of the answer, however multifarious those may be. If a party needlessly interposes special replications, or a general replication to each averment of the answer, the court, on motion, will either

order them from the files as unnecessarily loading the proceedings, or will impose upon the party filing them all costs thereby created.

SECTION IX.

Answer and Claim.

THE answer has to a great degree superseded all other modes of pleading, although originally in civil law tribunals, in ecclesiastical courts and chancery, the answer was not known or employed as a pleading.

It was obtained from either party, at the instance of the other, after issue joined or contestation of suit, upon interrogatories propounded orally or in writing, and was designed to supply proof from a party's own admissions in support of his adversary's cause. The party respondent appeared personally in court and was openly admonished and sworn by the judge to make full answer to the positions of the libel, and his replies were then taken in presence of the judge, or before such officer, and at such place as should be assigned by the judge.

This court for more than a century, has accepted answers in actions *in rem* and *in personam*, as legal defences and means of forming issues with the libel.

They have also become in the English admiralty, particularly in suits *in rem*, the ordinary modes of defence; though what are termed *answers* in personal actions appear to be little more than a general denial of the libellant's right of recovery, amounting to the general issue at law; and in both forms of action defence is there made by *exceptive allegations*, which seem to combine in a succinct form, the spirit of a special plea or demurrer, with that of a general denial of the libellant's right.

Although a party is cited or arrested he need not answer unless his answer is specifically demanded by the libel; and if it

be in a suit *in rem*, and he has no interest in the subject matter of the suit, he may, by an appropriate exceptive allegation or disclaimer, demand the judgment of the court whether he shall be required to answer and be not acquitted or discharged the action. (Rule 80.)

So one improperly made a defendant in an action *in personam* may be discharged from the suit in like manner, on its being made further to appear satisfactorily to the court that he can give material testimony in the cause. (Rule 81.)

The defendant has a right to notice such plea for hearing *instanter*, and it may be supported or rebutted by proofs the same as any other issue; and in case of decision in favor of the defendant his costs will be allowed. (Rule 80.)

When the libel is found multifarious or ambiguous, presenting no distinct allegations upon which issues can be taken, instead of demurring specially the defendant may on the return day of process, file an exception to the libel pointing out specifically the defects, and the proceedings to hearing, &c. upon such exception, shall conform to those on exceptions to other pleadings. (Rule 94.)

The libellant may amend of course in conformity to such exception, but if the matter is referred to the court, and the libel is pronounced insufficient or defective, unless it be amended by the libellant within two days after such decision, the libel will be dismissed with costs. (Rule 94.)

It is also the right of a defendant, when different suits are brought by parties having a common interest, or various actions all involving a like inquiry and defence, are prosecuted by one party, to move the court for a *consolidation* of the actions before he answers. (Rule 103.) This is effected by motion or petition on the usual notice.

In like manner different defendants, proceeded against in one suit, and setting up a common defence, may be compelled to consolidate their answers, and it is therefore always better that they unite in the first instance in their answer.

The preliminary matters being disposed of, the defendant must proceed to interpose his answer.

It is usually filed in open court on the return day of pre-

cess when proclamation is made thereon, and a copy is then handed the libellant's proctor, if present; but placing it on the files at such time will be sufficient notice to the libellant to prevent his proceeding *ex parte*. It is not compulsory upon the defendant to deliver a copy of his answer in such case, and he may leave the libellant to obtain it from the clerk's office.

When, for the purpose of taking proofs, or other object, the defendant wishes to answer before the term, he may do so immediately on service of process. (Rule 89.)

He can also file his answer at any time before default entered, but when this is done after the return day of process, he must give the libellant notice of the time it was filed. Without such notice the libellant may proceed as if no answer had been put in. (Rule 89.)

The answer, in form, should be certain and precise, meeting each material allegation of the libel with an admission or denial or sufficient matter of bar or avoidance.

The *protestando* with which it is usually prefaced is wholly unnecessary, and all recriminating or inculpatory statements, not being matters of defence, should be avoided.

It must aver every matter material to the defence or right set up against the libellant, because the proofs must be limited to the allegations, and no evidence, however important and pertinent to the controversy, can be admitted unless there be an appropriate averment in the answer.

If the defendant has no affirmative matters to bring forward on his part, and his defence consists in negativing the charges of the libel, and the answer is not required to be under oath, he may take issue upon the libel by merely answering "that the libellant is not entitled to the remedy and relief in the premises sought by him." (Rules 82, 83.)

The answer must be put in under oath when demanded by a sworn libel or one filed by the United States. (Rules 3, 87.) And it must then respond specifically to every allegation in the libel. When not sworn to and the course of the defence renders it necessary, the answer should also contain a like particularity and fulness of averments.

The answer may also be employed to perform all the offices of exceptions or special pleas and general demurrers, (Rules 76, 84,) other than that of pleas in abatement. (Rule 76.)

In this way the rigid formalities concomitant upon a train of special pleadings may be avoided, but the practice does not offer a defendant this facility to meet the plaintiff's action, and at the same time encourage him to draw out prolix and burthensome answers upon the matters of fact involved in the case.

When a bar at law is brought forward by the answer, the plaintiffs may reply to such bar singly, without regarding the issues in fact. (Rule 77.) And if the decision of the court is in affirmance of the bar, the defendant will be allowed no costs for any other part of his answer. (Rule 77.)

The attestation to the answer must ordinarily be made by the party himself; yet on proof that the defendant is out of the United States, or resides out of the district and more than one hundred miles from the place where the court sits, the answer may, in the first instance, be sworn to by the proctor or attorney in fact of the party. (Rule 93.)

The libellant may however be under the necessity of obtaining the defendant's own oath, or he may, without necessity, prefer compelling him to swear to the answer, and accordingly provision exists for his enforcing such oath, but under a stay of his proceedings a reasonable time to enable it to be taken abroad by commission or *dedimus potestatem.*

He must in such case, after the answer sworn to by the proctor or attorney in fact is filed, by written notice to the defendant's proctor, require the answer to be verified by the defendant's personal oath. (Rule 93.)

The answer must be signed by the proctor in the cause, and it is very proper that it should also be carefully perused, corrected and signed by the advocate, but this is not necessary to its admission on file.

Although the answer may be filed at any time after process served, yet if the defendant fails to perfect his stipulations in conformity to the rules, the answer may be treated as a nullity, and the defendant's default be entered. The an-

swer is regarded as in, only from the time the bail is perfected. (Rule 92.)

In case several parties are proceeded against *in personam*, or cited *in rem*, in a case proper for a joint answer, and they put in separate answers by the same proctor, or by proctors in partnership, or connected in business, no more than the costs of one answer will be allowed on taxation. (Rule 90.)

The United States may appear by the district attorney and answer a libel *in rem*. The answer is put in without oath and is not subject to exception. (Rule 91.)

An answer under oath has no effect as testimony for the defendant. (Rule 87.) It is no more than giving in sworn replies to interrogatories embodied in the libel. The rule of the civil law and chancery in this respect are different.

Either party may be compelled to answer under oath interrogatories propounded by the other upon any of his pleadings down to the decree, yet these sworn replies furnish no proof to the party giving them.

They are obtained by the opposite party in aid of his own evidence, and can only avail the one answering when read by the other party.

Any person having an interest in the thing arrested, may *intervene* in admiralty, whether made a party in the process or not, and *claim* in support of such interest.

As none but those having an actual interest are permitted to make themselves parties litigant, there must be proof preliminarily establishing the interest, before a *claim* can be received and filed.

The oath of the party himself is *prima facie* evidence, or he may give proof by the depositions of third persons. (Rule 74.)

The libellant may however take issue upon the allegations of interest, and proofs will be heard to that point, and the court will decide it before requiring the parties to litigate the cause upon merits. (Rule 74.)

The preliminary issue will be heard summarily, at the same term, if taken in term, and if taken in vacation, at the first stated or special sessions thereafter.

The plaintiff may also, without taking a formal issue upon the allegation of interest, petition the court to disallow the claim for want of interest in the claimant. The proceedings will in such case be the same as those on summary petitions. (Rule 74.)

It has been already stated, (ante, Sect 8,) what persons will be allowed to intervene, in behalf of others, without having any positive interest in the thing attached.

The United States may also in that way enforce liens of duties, or even a forfeiture, against the property in court.

The *claim* must assert specifically the interest upon which the party intervenes, but in other respects unlike an answer in its structure, it need not meet each particular averment in the libel.

It need not controvert the libellant's right in any respect, but admitting or not denying it, seek to secure a priority in, or the residue of the thing arrested after the libellant's just demand upon it is satisfied.

Of this character are usually claims interposed in cases of suits for seamen's wages, salvage, bottomry, &c.

When the claim is in derogation of the right set up by the libel, it may form a general issue therewith by denying "that the libellant is entitled to the remedy and relief in the premises, sought by him," without traversing or admitting the several articles of the libel. (Rule 82.)

Except where claimants own the thing in common, or they intervene upon the same grounds in behalf of a third party, (as a master or consignee of a ship, or foreign consul interveing for an absent owner,) the claims may be interposed separately, and no consolidation will be ordered by the court.

The default of one claimant, or a decree against him upon hearing, in no way affects the rights of others, as the issue with each forms an independent suit to be disposed of by itself, as though none other existed in relation to the subject matter.

A claim must always be put in under oath, and be subscribed by the proctor when one is employed; it is to be sworn in the same manner as an answer, (Rule 93,) and in all

other respects, not particularly noticed above, the proceedings upon a claim and an answer are precisely the same.

It very commonly is united with an answer, and this is the least expensive and most advisable practice, when the owner is both claimant and respondent, so that the answer or a decision upon that issue, may be evidence affecting the claim.

But when the issues are independent of each other in interest, the better course is to keep these pleadings distinct. The proofs applicable to the one and the other may be variant and besides, a party may come in with evidence and protect the property under a claim interposed for his benefit, who could not be heard in court on the respondent's answer.

Claimants are very apt also to file answers at large to the libel when not specifically required to do so. In such cases costs will be taxed for the claim only. (Rule 78.)

It is the usual formulary of libels and monitions, to call upon *all persons* having or pretending to have any right or interest in the thing, to appear and answer: but in our practice no coercive measures can be taken by virtue of these general clauses to compel any particular party to appear, and accordingly it is entirely *voluntary* and gratuitous for one not named and specially cited, to come in and file an answer.

The answer also is unnecessary in such cases, because in this court such issue may be made by means of the claim, as to exact from the libellant full proof of his entire case.

SECTION X.

Amendments and Exceptions.

THE practice of admiralty courts in permitting amendments in every stage of the cause, is of the most liberal character, it being the endeavor of those courts to have their proceedings so moulded as in the plainest and least expressive manner, to protect and further the rights of all parties.

When a libellant finds any irregularity or mistake in his process or libel, he may amend them of course before contestation of suit, in which case he should serve on the opposite party the proceeding amended, when a proctor has appeared and taken a copy of the libel.

When an amendment is by the addition of new or supplementary allegations, they must be connected with the amended pleading by plain references, without restating the previous steps in the cause. (Rule 7.) Supplemental allegations may be permitted in the circuit court after appeal, though new causes of action are introduced thereby.

It is not unfrequently the case with practitioners to recapitulate or rehearse all preceding processes as inducements to the amendatory charges. This is bad pleading, and costs are never allowed for such proceedings.

If the libel, when excepted to on the return day of process, is adjudged insufficient and be not amended within two days thereafter, it may be dismissed on the motion of the defendant, with costs. (Rule 94.)

If amendments are not made voluntarily, and either party considers the adverse pleading faulty, he may compel its correction or rejection by taking exceptions to it.

The libel, as before stated, is subject to exception, (Sec. 3, Rule 94,) but this proceeding is usually applied to the answer and claim, or answer of either party to interrogatories propounded him by his adversary.

Exceptions are usually taken, because the matter set up by the claim or answer is scandalous, insufficient or irrelevant. They may be filed at any time within four days after the pleading perfected, (Rule 95,) and must clearly, but briefly specify the parts of the pleading excepted to.

The party excepted against may, within four days, give the other written notice that he submits to the exceptions. (Rule 95.) In which case he must forthwith rectify his pleading conformably to the objections; or if he regards the exceptions unfounded, must notice them for hearing for the earliest day in term thereafter, if four days intervene. (Rules 95, 97, 98.)

This practice dispenses with the usual procedure in chancery, to refer the exceptions and then bring the subject before the court by exceptions to the master's report, and adopts the direct course of calling upon the court in the first instance for its judgment upon the matter.

If neither of the foregoing steps are taken, the default of the party excepted against may be entered, and the same order be thereupon entered, as if the exceptions had been sustained by the court on hearing. (Rules 95, 97.)

As the practice of the court is highly indulgent in regard to all matters of mere form, it does not encourage severe and captious objections by way of demurrer, exception or motion.

When pleadings are objected to for defects not necessarily connected with the substantial merits of the cause, though judgment may be given in conformity to the objections, yet costs are denied.

When exception is taken to the answer to the interrogatories proposed by one party to the other, the proceedings are to be the same as if taken to a formal pleading. (Rule 101.)

Admiralty courts do not demand an over strict precision and exactness of statement in pleadings, or answers to interrogatories; when these are certain to a common intent, so as to supply allegations, answers or admissions, putting the opposite party in fair possession of the point advanced, and without equivocation or ambiguity, they are held sufficient, although not technically expressed, or stated with logical arrangement and dependence of parts.

SECTION XI.

Seamen's Wages.

THERE is a special procedure on the part of seamen, suing *in rem* for wages, which will be most conveniently treated of distinctly from other actions.

It is directed by act of congress that "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract: and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace, to summon the master of such vessel to appear before him, to show cause why process should not issue against such vessel, &c., according to the course of admiralty courts to answer for the said wages, and if the master shall neglect to appear, or appearing shall not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk shall issue process against the said vessel, and the suit shall be proceeded in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the vessel) shall be joined as complainants. (Act July 20, 1790, Sec. 6.) A later statute supplies a like remedy for seamen engaged in the cod, mackerel and bank fisheries, (Act June 19, 1813, Sec. 2.) The shares earned and adjusted in whaling and sealing voyages are regarded in admiralty, as wages for which seamen may take the like procedure. This procedure is not restricted to *seamen* as a professional class; all persons employed on ship-board, at sea, in aid of the navigation, safe keeping, and proper equipment of the vessel for the business in which she is engaged, earn wages, which may be recovered in admiralty, and the benefit of this initiatory process is extended to them. Engineers and firemen on board steam-boats—stewards, waiters, chamber-maids, &c. on board

packet vessels, may sue here for their wages earned at sea, and with the advantage of the preliminary summons.

The voyage is ended in nautical contemplation when the vessel is safely moored at her port of destination.

The final port of destination named in the shipping agreement and the port of discharge, are generally the same. They are not necessarily or invariably such. The vessel is frequently removed, after the termination of her voyage, to another port to unlade.

The discharge or unlading may be delayed by the owner, master or consignee, waiting a market, convenient storage, &c. from dilatoriness or wilfully with a view to procrastinate the payment of wages.

The terms of the act "until the cargo or ballast be fully discharged," are not therefor adhered to literally. They are regarded as fulfilled when a reasonable time for delivering the cargo has elapsed. That time is commonly limited to fifteen days, but to be abridged or prolonged according to the exigencies of the case to be made manifest by the party demanding a deviation from it. So also if the seamen are discharged from the vessel after her arrival, arbitrarily by the master, or by their assent, the discharge terminates the contract, and the delay of ten days after the delivery of the cargo is released and the seamen may proceed at once for wages.

This is usually the foundation of the procedure in this port: the crew being rarely retained to unload, the work being done more expeditiously, with more care and at less expense by stevedores, whose principal occupation is to load and unload vessels.

When the work is done by seamen, the wages continue to the full delivery of the cargo, from which time the ten days' credit commences. This circumstance, together with experience of the injurious effect upon sailors, of being left in port ten days without money or employment, have no doubt led to the practice, now almost an usage, of discharging the seamen on the arrival of the vessel.

It should also be added, that masters and owners almost invariably pay the wages immediately on the discharge, and

it has very rarely happened, for the last eleven years, that a vessel has been proceeded against for wages at this port, except when objections were raised to the entire claim as forfeited, &c., or to payment of the amount demanded, or the master was without funds or credit. When a controversy exists, the master most generally prefers discharging his men and allowing them to seek their rights at once; and it would seem in this case the statute intended they should be at liberty to bring suit immediately, without waiting a discharge or the expiration of ten days; there being an alternative condition upon which the summons may issue, "If such wages shall not be paid within ten days after such discharge, *or if any dispute shall arise between the master and seamen, or mariners, touching the said wages,* it shall be lawful," &c.

It is understood to be the practice in some districts to regard this last alternative as nugatory, and to withhold the summons at all events until the ten days have run out.

The practice is different here. If either clause displaces the other, the latter, according to general rules of interpretation, would have effect. The legislature are understood, in this court, to intend, that if the master disputes the seamen's claim of wages, putting them to the necessity of suing therefor, they are then remitted to their right under the maritime law and may proceed at once to determine such right.

If the ten days' delay are allowed for the purpose of ascertaining the safe condition of the cargo, or to enable the master to collect his freights, they will ordinarily have run out before the dispute can be brought to trial, and the master will be in possession of his funds or be prepared to show an embezzlement before the procedure in court can have affected him prejudicially. Accordingly a summons issues here upon proof that the master denies the right to wages and will not pay without suit, although the ten days have not elapsed.

The first step is to prepare a brief petition to the judge stating the voyage performed, the terms of the agreement, (if articles were signed,) and if no written agreement was entered into, the highest rate of wages at the home port where

the contract was made within three months immediately preceding the contract, the full performance of the agreement by the sailor, or his release therefrom by the master here or abroad; the termination of the voyage, discharge of cargo or ballast, the expiration of ten days, or else in excuse for not unloading, &c. a dispute touching the wages, or his discharge at the end of the voyage by the master.

The petition prays for a summons in conformity to the act, and it should contain a clause that the summons issue in favor of all the crew who may afterwards join in the proceedings, as in that of the particular applicant; on being sworn to by the petitioner, it is presented to the judge or magistrate, who, if the case is within the statute, signs a summons returnable ordinarily the next day, but *instanter* if the case is urgent and the order can be sufficiently served.

Service must be personal on the master if he is on board—if not on the mate, or whoever has charge of the vessel. Should no one be found on board, the summons must be posted conspicuously on the mast, and it will furthermore be required of the petitioner to serve a copy on the owner or consignee, if in the port, unless it be proved by the affidavit of the petitioner or his proctor that reasonable inquiries have been made and neither the owner or consignee can be found.

If there be proof of adequate service of the summons and no one appears in opposition to the petition, the judge immediately signs a certificate to the clerk "that there is sufficient cause of complaint whereon to found admiralty process." This certificate being filed the party proceeds as in other cases to sue out the attachment, except that he is not required to give any stipulation for costs in commencing the suit. (Rule 45.)

The libel, when one has been prepared, may be used in the first instance on the application to the judge instead of a petition, and the summons is granted upon the prayer for general relief. The certificate endorsed upon that authorizes the attachment to issue *instanter* without any other proceeding upon the part of the libellant.

When the master or owner appears on the summons, it is required of him to prove the wages paid or forfeited. The "otherwise satisfied" spoken of in the act, is understood to be tantamount to payment, and not to embrace defences, by way of denial that wages were earned, or mulcts or penalties incurred, which may diminish the amount.

For several years, the judge was in the habit of holding a sort of advisory arbitrament between the sailors and master, hearing the allegations of both parties pretty much at large, and taking proofs on both sides, and the matter was generally adjusted upon the suggestion he might then make, either that the libellants could make out no just ground of claim for more than a part of their demand, or that the defendant's exceptive allegations or matter of bar, would defeat the libellant in whole or in part.

Cases however became so numerous in this port, and the tendency to press these summary inquiries into contestations of the suit at large, by employing counsel, summoning numerous witnesses, and asking delays to obtain testimony not present, that for several years past the judge has declined hearing any thing further than proofs upon the points, whether the wages are *paid* or *forfeited.*

The *forfeiture* referred to in the act, is regarded strictly, as the same specified in the preceding section, which can be proved by the log-book of the ship alone:—but it has been also usual to allow proofs of gross acts of mutiny or insurbordination, which would incur no less punishment than forfeiture, and to refuse process against the ship, if such proof was not controverted on the part of the sailor. But if the forfeiture stipulated in the articles, or resulting from the inhibitions of the maritime law are urged against the claim of wages, and there appears probable ground, to doubt their full enforcement, they will not be inquired into in this summary proceeding. The defendant will be left to bring them forward as a defence in a regular contestation of the suit. They are never allowed to intercept the action, except the matter be so palpable as to leave no doubt what the result must be on trial.

Such cases, may come within the fair equity of the statute, although most probably the legislature contemplated in this connection no *other forfeiture* than the one it had just defined, and prescribed the mode of proof.

The proceeding on these hearings is devoid of formalities and most strictly summary, *levato velo.*

The sworn libel or petition is accepted as *prima facie* proof of the demand.

The owner or master must then produce legal evidence of payment or forfeiture. The master is always received as a witness, if not part owner, and the sailor's receipt or the books of account of the ship usually settle the question of payment *instanter.*

When the master or owner after hearing, expresses a wish to pay the amount to avoid the arrest of the ship, the judge will, if so moved, either withhold the certificate a reasonable time, or will, upon its face, direct it to take effect at some posterior time if the demand is not intermediately settled. Sometimes it is delivered absolute to the counsel in the first instance, but under an injunction not to file it or take proceedings under it, until the allowed period for payment shall have elapsed without the terms being complied with.

Costs are rarely taken into account on these proceedings: and when the question is raised, there seems generally about an equal propriety with each party in appealing to a hearing, and they are accordingly directed each to bear his own costs.

As the jurisdiction is given to a justice of the peace, with the same fulness as to the judge, it hardly seems proper to regard the proceedings as coming within the principle of a suit in court, carrying with it as an incident, the right to claim costs.

When costs are ordered to be paid, they are limited to the expense of the petition, service of the summons, and perhaps attendance of a witness; no advocate or proctor fees are taxed.

Most commonly one or two seamen present the petition without being joined by the rest of the crew.

It is not necessary, in order to give the others the benefit

of the suit, that any summons or preliminary examination should be taken in their behalf afterwards.

The vessel being under arrest, they can come in and be made parties and have the benefit of the attachment, the same as if it were an ordinary suit *in rem*.

Should the demands of those upon whose petition the arrest was made be satisfied pending the suit, and a suggestion be made against the validity of the claims of the other libellants, the court would not detain the ship in custody in their behalf without strong *prima facie* evidence of the justness of their demands.

The owner or master might move the court for the immediate discharge of the vessel, unless the libellants brought their cause to hearing at once, or gave the court satisfactory proofs of a just balance due them.

In some districts it seems to have been allowed seamen, when they began the proceedings prematurely before the time at which they could enforce their wages, to suspend the proceedings instituted, until the arrival of that period, and then carry them forward as if rightly commenced.

That has not been the practice here. The case is heard and decided upon the rights of the parties as they then exist, and if the sailor is not yet entitled to arrest the vessel for wages, the whole matter is dismissed and the master is not held subject to the summons to await the ripening of a cause of action.

The objection however is usually waived by the master when he intends making a defence to the demand, and the judge will then suffer the proceedings to go on as if correctly instituted.

No summons is granted here when the action is *in personam*, nor need all the men unite in such suit, unless a consolidation is moved by the respondent; nor when it is averred in the libel and attested to on oath, that the vessel is about to go to sea and before the expiration of ten days from her unlading, need the libellant's take a summons or wait the expiration of ten days, but may have a warrant of arrest issued forthwith.

The act is not construed in this court to apply to suits *in personam*, so as to delay their commencement after the voyage is ended and the vessel discharged when the seamen unload her.

The provisions of the statute seem to have exclusive reference to proceedings *in rem*, because the certificate of the judge is to authorize no other process than one to arrest the vessel, and because no provision is made for giving immediate process, if the master is about to abscond or remove from the jurisdiction of the court. As the statute authorizes no process to follow the hearing, a summons in cases *in personam* would be of no other effect than to seek the advice or opinion of the judge in the matter, which either party might follow or neglect at his option.

The act is understood here also, only to apply to those voyages in which the master is bound to *make an agreement in writing*, with the seamen; and in strictness not to include the cases of seamen shipped abroad to work the vessel to her home port: but this latter class under an equitable extension of the practice, have most commonly been admitted to the same remedy with those of the crew carried out from the United States.

Those coming directly within the act, are the crew "of any vessel bound from a port in the United States to any foreign port, or of any vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state."

But the judge of this district has been in the practice of allowing a summons to crews of coasting vessels, or those sailing on tide waters in this state, not coming within the statute, with a view to secure their prompt payment or to avoid the heavy expenses attending an arrest of the vessel, when it satisfactorily appeared that the mariner could have no convenient remedy *in personam*. The preliminary hearing has generally resulted in a settlement satisfactory to both parties, but when such adjustment was not voluntary, no certificate to authorize the attachment of the vessel has been

granted. The petitioners were left to pursue their remedy according to the rights given by the law maritime,

Recently, there has been a tendency to apply this remedy so frequently in that class of cases, particularly to vessels navigating the North River, and Long-Island Sound, that the judge has generally declined taking cognizance of them, by way of summons at all.

The remedy now supplied by *summary actions* will probably in a great degree supersede the importance of a preliminary summons, as parties can be promptly and fully heard, in that form at slight expense.

SECTION XII.

Seizures.

SHIPS or cargoes arrested on the high seas for violations of the laws of the United States, subjecting them therefor to confiscation and forfeiture, and also when found in port, are in the first instance *seized* without any process of law.

The collector seizes under direction of acts of congress, without warrant, and the commanders of public ships and private armed vessels seize upon the high seas, under their instructions and commissions. But the property when seized within the jurisdiction of the court, or when it arrives within, if seized out of the district, must be proceeded against by libel as in ordinary cases.

It seems to be considered in some of the United States' courts, that the collector on his seizures holds the property until final condemnation and sale, and during the pendency of proceedings in court respecting it, becomes virtually the officer of the court, in regard to the property seized.

A different interpretation is put upon the various acts of congress in this court, and the collector, like the master of the public ship, is considered as holding the property under his seizure only until "*seized, libelled and prosecuted in the*

proper court," pursuant to the directions of the statute. His custody thus becoming qualified, and being superseded and discharged when the process of the court acts upon the property. The act of May 8, 1792, Sec. 4, applies to the case after the property is "*seized, libelled and prosecuted*" as directed by the act of March 2, 1799, Sec. 89.

The place of seizure, if in port, determines the jurisdiction of the court, wherever the offence may have been committed, and accordingly the prosecution must be in the district where the seizure is made.

When the seizure is on the high seas, the libel is filed in the district where the property is first brought.

The libel is in the name of the United States, unless expressly otherwise directed by statute. It must state by plain averments the offence charged and the property forfeited, and name the act of congress, under which the prosecution is conducted.

If defective or uncertain, it will be reformed on summary exception. (Rule 95.)

If several libels or informations are filed against a cargo or merchandise, seized as forfeited for the same cause, no more costs than for one libel are allowable, whatever may be the number of owners, &c., but the costs incidental to several claims may be allowed. (Act July 22, 1813.)

When filed the clerk issues of course an attachment against the property, and a monition to all interested therein.

This is served by the marshal by taking the property into his own custody, and publishing, fourteen days previous to the return of the attachment, a monition to all persons interested to appear. All subsequent proceedings, in speeding the prosecution or defending against it, or being discharged from it, are the same as in other actions *in rem*.

When the seizing officer refuses to institute proceedings *in rem*, the court may on the application by petition or motion of any party interested therein, compel him to proceed to adjudication, or abandon the seizure. The more formal mode is to issue a monition. So the property may be reclaimed and recovered back, by the party entitled thereto, either by original

suit or by a summary decretal order of the court, made in a cause pending.

All parties having an interest in the thing, are parties to the proceeding *in rem* for forfeiture, so far as to render the decree of the court conclusive upon such parties, in regard to all points directly in judgment.

In the early practice of the court in this district, much formality was used in conducting prosecutions for forfeitures—assimilating them very closely to plenary suits in admiralty and ecclesiastical courts.

When the attachment and monition was returned served, the United States' attorney moved the court that the libel be filed and read. Thereupon he further moved, that publication be made for all persons to come in and show cause why the property should not be forfeited, and the proclamation was made accordingly three times, and no one appearing the default was entered.

The attorney then moved and it was ordered that the clerk prepare a notice for publication by the marshal, directing the order of publication, and when to be returned. On the return of the marshal that he had made publication as directed, the attorney again moved three proclamations and the second default.

Usually two days thereafter the same notice and proclamations were again made and then the third default.

The final decree might well follow, but it was usual the succeeding day to repeat proclamations and then take the order of condemnation.

A claimant might be admitted to appear any time before the third default.

These multifarious proceedings began soon after the organization of the court under the United States' constitution to become consolidated, and dropping first the reading of the libel, then the triplication of proclamations, and then the succession of defaults, the court for nearly thirty years, had notice published fourteen days before and the three proclamations all made on the return day of the attachment and monition, and the default and final decree of condemnation then entered also, if no claim or defence was interposed.

The rules now dispense with the useless repetition of proclamations, requiring but one to be made. (Rule 35.)

The monition and publication are the effective notices, and in the practical conducting the business of courts at the present day, the proclamation in court is an idle ceremony, bringing notice home to no one, and serving no further use than to call those actually attending in court for the purpose, to the period meet for them to make their defence.

The proceedings on seizures for forfeitures vary only from ordinary actions on the admiralty side in this, that the libel must specify the statute under which the forfeiture accrues, and allege the facts constituting the offence, (Rule 180,) and that the notices must, by appointment of statute, be published and affixed at least fourteen days.

The notices must be published in a daily newspaper, designated by the court, and be placed up conspicuously where the marshal's notices are posted, in the public hall of his office and of the court room.

The marshal usually arranges to have the notices published, for the compensation allowed by the statute, in a morning and evening paper, sometimes both at the same time, but most usually, different notices are sent to the different papers.

Libels of information are subject to dismissal on the motion of the respondent or claimant, if not proceeded in with the despatch the course of the court admits. (Rule 136.)

SECTION XIII.

Prize Cases.

The proceedings of prize courts in all maritime countries are closely assimilated, the allegations, proofs and proceedings being modelled upon the civil law, with such alterations or additions as peculiar national usages and the rights of belligerants and neutrals unavoidably impose.

The general principles recognised by those courts are international, rarely varied or departed from by the special edicts of particular governments, and the practice maintains a correspondence not less uniform.

In the European tribunals the first process of the court is usually invoked by a petition, and the cause proceeds to hearing upon the basis of that petition; and the libel and final pleadings are employed only when further proof is required by the court, and the cause is placed in a condition for more solemn investigations.

In this court the initiatory proceeding is to file a libel. (Prize Rule 24.)

With a view to the convenient exercise of the prize jurisdiction, this court issues a commission under seal, to persons resident in the important sea-ports of the district, appointing them commissioners in prize causes.

There are usually two appointed for the port of New-York, and one at such other ports, as it may be probable vessels will arrive with prizes.

So soon as a prize is brought in, the captors must give notice in writing to the judge of the district or one of the commissioners, of the arrival of the property, and where it may be found. (Prize Rule 2.)

The captor shall at the time of such notice deliver on his affidavit, to the judge, or to the commissioner repairing on board, all documents and writings found on board the prize. (Prize Rules 8, 9.) In default of such notice for a reasonable time, the commissioner must repair to the property, and proceed as if notice had been given by the captor. (Prize Rules 7, 23.)

Within three days after the captured property is brought within the district, the captor must produce before a commissioner three or four, if so many there be, of the company or persons who were captured with, or who claim the property, and in case the prize be a vessel, the master and mate or supercargo, if brought in, must always be two, that they may be examined in preparatory upon the standing interrogatories. (Prize Rule 12.)

The commissioners can use none but the standing interrogatories, unless others are specially directed by the court. (Prize Rule 13.) Nor take any further examinations after the first are filed, without the special order of the judge. (Prize Rule 28.)

If the captor neglects giving the notification to the judge or a commissioner, for twenty-four hours after the property is brought in, or does not produce the witnesses before a commissioner for examination in two days, any person claiming the property may give the notice, and have the like proceedings as if the notification had been given by the captors. (Prize Rule 23.)

So soon as the captured property is brought in, and even before the examinations in *preparatorio* are completed, a libel may be filed against it.

The proceedings after libel filed are the same as on seizure of property as forfeited under the revenue laws. (Prize Rule 24, ante, Sec. 11.)

When the capture is made by a ship of war, or the public forces, the libel is filed in the name of the district attorney in behalf of the United States, and the officers, &c., of the capturing force.

On captures by private armed vessels the libel will be in the name of the officer of the capturing vessel, in behalf of himself, his officers and crew, and all others concerned.

Under these general allegations the court will decree the distribution of prize money in conformity to the allotment made by acts of congress, or the stipulation of parties *inter se*, (not contrary to law,) or conformably to the general rules of prize jurisdiction.

If the capture is made by individuals without any public authorization, (as recaptures from a prize crew, or a volunteer expedition against an enemy's vessel,) the libel will be in the name of the captors individually.

Libels in favor of private captors, are filed by proctors, those in behalf of any public force of the United States, by the district attorney; but the court on satisfactory cause

shown may allow libels to be filed in the latter cases also by any proctor, approved by the court.

Joint captors, actual or constructive, if not named in the libel, may become parties by petition, or by leave of the court may file their libel against the captured property, or its proceeds in court. Their claim however will not be received in the supreme court, after appeal.

So the crew of a private armed vessel may libel for a distribution of their proportion of prize money decreed, when the proceeds are in the hands of a prize agent, or officer of court.

A more expeditious procedure, as against the marshal or clerk, is by petition or motion, on which summary relief will be granted by the court, if the money is improperly retained.

A general prize allegation in the libel is sufficient to cover a claim for military salvage also, and it is unnecessary and inexpedient to allege and claim the salvage; and a general prize allegation is improperly joined with an information for seizure, for the violation of a statute.

If the captor neglects producing witnesses and proceeding against the captured property two days, after its arrival in port, any person claiming the property may file his libel for restitution and proceed thereon conformably to the usual course of the court. (Prize Rule 23.) The *onus probandi* still lies on the claimant.

If the claimant intervenes to save the interest of an absent owner without authority to take possession of the property, he may by libel or petition, have a monition granted, citing the captors to proceed to adjudication, which if they will not do, the ship or property will be adjudged to the party proving an interest. This is the practice in the English admiralty in respect to all claimants.

The existing interest in the subject necessary to entitle a party to become a claimant on the instance side of the court, is not exacted in prize cases; a substitution of interest may be allowed, and an oath as to belief of interest may be sufficient.

The United States may intervene, on the ground of collusive capture, to secure and enforce their rights; whether

growing out of the breach of municipal regulations, or of the laws of war.

In the English admiralty the claim pursues a fixed form, and as that is adequate to protect all the interests of a party, it would conduce to greater simplicity in practice, to have it adhered to in our courts.

In England the claim must be interposed within twenty days after the execution of the monition, but our practice requires it to be filed on the return day of the monition, which would be never less than fourteen days, and rarely more, unless time is granted by the judge.

If no claim is filed the libellants offer their proofs in preparatory at the same term, and on a sufficient case made take a decree of condemnation. The claim is always on oath, at least, as to the belief of the party.

A foreign consul is permitted to claim in behalf of a citizen of the government he represents, but the property or proceeds will not be delivered him without further authority.

But an alien enemy will not be admitted to claim, nor can a citizen claim the property of an enemy on a sale made since the war.

An original suit against captors, &c., for damages may be sustained, although no claim has been filed; but usually a claim is given in, and no such suit can be brought without first filing the affidavit of the claimant showing good cause of action.

The claimant cannot have property delivered him on bail before hearing, in a prize cause, unless by the assent of the libellants; but after hearing it, may at the discretion of the court, be delivered on bond.

In cases in which the United States are concerned, notice must be given the district attorney before the property can be delivered on bail.

An appellate court may compel the claimant to account for property delivered on bail by the district court.

Usually a claim is first given in, when it is intended to bring suit against the captors for damages. But such action

will lie without—the claimant first filing his affidavit, showing probable cause.

When proceeds lie in court a year and a day, waiting a claim, and none is interposed within that time, condemnation follows of course to the captors, *in poenam contumaciæ.*

The libellants and claimant may by assent, have perishable property sold and the proceeds deposited in court at any time after its arrival in port. (Prize Rule 25.)

This may also be done on the affidavit of the captor alone, before claim filed, (Prize Rule 26,) and as at least fourteen days must intervene from the service of the monition, before a claim can be exacted, the proceeding for such sale when urgent will usually be *ex parte.* So a sale will be decreed for any adequate cause pending the suit, in which case the proceeds must be brought into court, to abide the final decision. There should always be an appraisement before sale or delivery to bail, that the court may be correctly advised as to the value of the property.

Appraisement is made as in ordinary admiralty causes on the instance side of the court.

The causes are to be placed upon the calendar for hearing by the clerk, in their order, according to the date of the return of each monition. He is also to keep constantly affixed in the clerk's office and court room lists of the causes ready for hearing. (Prize Rule 27.)

This is to be done whether claimants appear or not, because the right to condemnation may be contested without a formal claim interposed. And when no proofs are expected to be offered by a claimant beyond what are procured on the examination in preparatory, there would be no utility in his coming in with a claim in form, inasmuch as his advocate may be heard upon the captor's proofs, and a condemnation as *prize* is never made in the first instance upon a mere default in not claiming, without at least strong presumptive evidence that it is enemy's property. The court must be informed by the proofs that it is a case of prize. If there be probable evidence of a neutral character, sentence is suspended a year and a day to enable the proper party to claim. If

the property is acquitted, a proper party to receive it may then be presented the court.

When the court entertains a doubt upon the preparatory proofs, it may in its discretion order *further proofs*.

After such order in the English practice, the parties may be put to plead, and each cites the other (both becoming plaintiffs or claimants) to *allege*. With us the libel already filed and the claim when in, are all the pleadings necessary, and accordingly the parties are prepared *instanter* on the order, to proceed with further proofs. But *further proof* when in *general* is proof on the part of the *claimant*. It may be made by affidavit without filing a claim, but witnesses cannot be examined and depositions, &c. introduced, unless a plea or claim presenting a proper issue, be interposed.

When the claimant offers affidavits only, the captor cannot, except under special circumstances and by express leave of the court, produce counter affidavits or depositions.

The captor on such further proof is however allowed to *invoke* papers from other captured vessels.

For this purpose he obtains the mandate of the judge, upon affidavit satisfying the court that the papers are material and necessary. (Prize Rule 32.) When the invocation is allowed, the papers at large are not to be withdrawn from the other vessels, but extracts only (properly authenticated) are to be used. (Prize Rule 31.)

The captors may also invoke from other causes, the affidavits and depositions of the same claimants. (Prize Rule 33.)

When the court orders *plea and proof*, the proceedings, according to the English practice, are the same as in other admiralty causes, each party being at liberty to allege such circumstances as may tend to acquit or condemn the property, and to examine witnesses in support of the allegations.

And in the American courts the like principle prevails, when the further proofs are taken under a libel and claim.

Further proof in prize cases is never admitted in the way of oral testimony—it must always be by written evidence and deposition. No commission, however, is allowable to take evidence in an enemy's country. And when the cause has

been heard upon further proofs the decision is final; no second reference is even made for further proof.

Upon an order for further proof, it is almost the invariable practice for the claimant, besides other testimony, to make proof by his own oath of his proprietary interest and explain the circumstances of the transaction.

SECTION XIV.

Summary Actions.

As the jurisdiction of admiralty courts is general without regard to the amount claimed, parties may prosecute therein for the recovery of the lowest sum for which judgment can be given.

These small demands, which are usually referred to justices of the peace or other tribunals proceeding with great despatch and at little cost, have been here subjected to the ordinary processes of the court, and recovered under grievous delays and with burthensome expenses to parties.

The district courts having exclusive jurisdiction in these small demands (their decrees being final when the sum in demand does not exceed fifty dollars) ought, if within their competency, to adapt the procedure in these matters to the quality of the claim, and afford parties a remedy equally prompt and advantageous with that given in like cases by law judicatories.

The act of congress of 1793 not only imparts broad powers to the United States' courts for regulating their practice, but seems to enjoin the exercise of these powers in a way that may insure despatch to the business before them.

It empowers them, "from time to time, as occasion may require, to make rules and orders for their respective courts," specifying various particulars to be regulated, and then adds, "and otherwise in a manner not repugnant to the laws of

the United States, regulate the practice of such courts respectively as shall be fit and necessary for the advance of justice, and especially *to that end to prevent delays in proceedings.*"

It has been settled that congress could well bestow this legislative authority on the courts, and in almost every tribunal within the United States it has been largely exercised since the passage of the act.

If the course of procedure established in this court in respect to *summary actions* comprehending all cases not appealable, seems at first a broader departure from common usages than has before occurred, it is thought the most pressing exigencies will be found to justify the change in this district.

The great mass of actions of this description are suits by the United States *in rem* for the forfeiture of articles of small value, and by sailors claiming balances of wages or earnings on short voyages along the coast, to the West Indies or even Europe; for such is now the rapidity with which these voyages are performed, that there will rarely remain after deducting the advance, fifty dollars due a sailor for wages earned from his departure to his return to the home port, particularly in voyages to London, Liverpool and Havre.

The average of claims of this description will be found approximating nearer the minimum than maximum of the exclusive jurisdiction of the court.

To speed justice and spare costs in matters of this character, the court gives *summary* remedy in suits wherein less than fifty dollars is claimed. (Rule 165.)

No formal libel need be filed by individuals. It will be sufficient to file an account stated, or a bill of charges by items, or a short petition praying relief and stating the matter of the demand and the amount or value thereof. (Rule 166.)

The latter mode is more appropriately adapted to *possessory* or *petitory* suits. The ordinary actions for money claims, for wages, materials, services, &c. are best instituted by filing the account intended to be proved on trial.

When seamen have proceeded by summons before the judge or magistrate, (ante, Sec. 11,) the petition or statement upon which the summons was granted, may be filed in place of a libel. (Rule 167.)

If the arrest of property or the person is sought, the account or petition must be sworn to before filed, as in ordinary cases. (Ante, Sec. 3.) When a monition or citation only is prayed for, the process will issue of course on filing the proper paper. (Ante, Sec. 3.)

Process *in rem* or *personam* may be made returnable at the first court stated or special after service, three days intervening between the service and return in suits by individuals, and fourteen in suits by the United States. (Rule 171.) This dispenses with the fourteen days' notice ordinarily given in individual suits, and the notices to be published will of course be during the interval between the service and return day of the process, never however being less than three days. (Rule 171.)

The notices published must be subscribed in the name of the marshal and proctor of the libellants, and need only contain in individual suits, the title of the suit, the cause of action, and amount demanded, with the day and place of return of the monition. (Rule 172.) Only the usual printers' fees for advertisements of like magnitude will be taxed for the publication. (Rule 172.)

Any party entitled to contest the demand may appear and plead or answer so soon as process is served, (ante, Sec. 9,) and he must appear on the return day of process or the actor may take a decree in default. (Ante, Sec. 6.)

In summary suits the demand may be contested orally or in writing, by general denial or affirmance, or the party appearing may file a plea in bar, an answer or claim. (Rule 168.)

On the return of process, in open court, duly served, the cause may be put upon the calendar, and either party proceed to proofs and hearing, *instanter*, without other notice. (Rule 171.)

And if either delays the other by moving and obtaining a

postponement of the trial, he shall bear the taxed costs of keeping *the thing* held under attachment, from the time of such continuance to the final hearing. (Rule 171.)

The proceedings in summary suits by the United States, cannot be made to conform to those by individuals, until after process returned. The act of congress requires a libel to be filed, and that fourteen days' notice shall be published, previous to the return of the monition, &c. Up to that point the ordinary practice will accordingly be pursued. (Sect. 12.) Except that, when the collector has seized the goods and has them in his possession, the clerk will issue a monition only, upon the libel, omitting the attachment clause at the request of the district attorney. (Rule 173.)

And that furthermore, although an attachment and monition both issue, yet if the marshal returns that the goods, &c. are in the custody of the collector, he shall be discharged of all responsibility for their safe keeping, or production to answer the decree. (Rule 174.)

The court proceeding in this particular upon the assumption, that the collector by his own assent and that of the district attorney, or by presumption of law, becomes *quoad hoc*, the officer of the court subject to its jurisdiction respecting the detention and disposal of the property seized.

This as before stated (Sec. 5, 12) is contrary to the usual procedure of the court, and such authority over him would be cautiously exercised, if objected to by the collector.

The monition, when the property is held by the collector, is served by leaving a copy with the person actually having the goods in custody, and also with the owner or his agent, if made known to the marshal, and resident within the city of New-York. (Rule 175.)

The costs to be taxed the district attorney or proctor and advocate on either side shall not, in summary causes, exceed twelve dollars. (Rule 176.)

This sum is designated because, it is supposed, the district attorney by statute could be entitled to that amount, and the services being substantially the same, the rate of allowance

to proctors should, so far as directed by the court, be made to correspond with the statutory provisions.

A rigid taxation may in many instances reduce the costs below this sum. But however proceedings may be extended, it is not designed that more than the $12 shall be recoverable for professional services in a summary suit.

The acts of congress having established no tariff of fees to proctors and advocates in admiralty causes, the matter of costs is always understood to be left to the discretion of the court to be regulated by its rules of taxation.

Costs against the opposite party will not be taxed in summary causes for serving writs of subpœnas though directed to the marshal.

An attachment may be obtained against witnesses for not obeying a summons to appear and testify without serving a writ of subpœna.

Nor will fees be taxed for more than one witness to prove the same facts, unless it appears he was impeached or his testimony contradicted. (Rule 177.)

Summary actions are to be conformable to the general course of procedure of the court in all particulars not specifically regulated by rule. (Rule 179.)

SECTION XV.

Proofs.

GREAT skill and attention are required in preparing and expediting the testimony in admiralty causes. The duty devolves chiefly upon the proctor, the proofs being generally in writing taken by examinations under the act of congress out of court or by commissions sent abroad.

Either party may proceed to take proofs so soon as the cause is commenced.

This privilege is highly important in maritime causes,

the witnesses being very commonly sailors, whose examination may probably never be obtained, unless secured at the instant. These proofs are accordingly frequently taken before the plea, answer or claim filed. Of course such parts as do not correspond with the pleadings will be rejected at the hearing. Parties, however, need seldom err as to the applicability of the testimony so taken, inasmuch as the libel on file supplies a guide for proofs on both sides, and ordinarily the tenor of the defence is sufficiently understood to enable the libellant to call in countervailing evidence to that which the defendant may be entitled to offer.

Depositions to be read in admiralty causes may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, or before commissioners appointed by the circuit courts to take affidavits.

The officer taking the deposition must not be counsel or attorney to either party, or interested in the event of the cause.

The commissioners appointed in this circuit are the clerk and his deputy or chief clerk, the chief deputy of the marshal, (these officers to be designated by their appointments filed in the clerk's office,) and the clerk of each county in the southern district, except the city and county of New-York. (C. C. Rule 104.)

An affidavit must be prepared, stating the pendency of a civil cause in court in which the testimony of a witness (named) is necessary; and that the witness either resides a greater distance than one hundred miles from the city of New-York, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district, and to a greater distance than one hundred miles from the city of New-York, or that he is ancient or very infirm, (giving the particular reason according to the fact.)

This deposition is presented to the proper officer, and if he is satisfied that a proper case exists for the examination

he orders a notification to be given the adverse party, to be present at the examination and to put interrogatories if he wishes.

This notification must be served on the adverse party or his attorney, whichever may be nearest, if either is within one hundred miles of the place of taking the depositions; and in proceedings *in rem* where the adverse party is not named and has not intervened, the notification is given to the person having possession of the property arrested.

A proctor is the substitute or attorney of the party in this behalf, and therefore service on the proctor when one appears is good.

A reasonable time will be allowed by the officer, usually four days in city examinations, but not less than one day, exclusive of Sunday, for every twenty miles distance of the party or proctor notified.

At the time and place designated by the officer the parties with their proctors and witnesses, usually attend city examinations, and the witness is examined by the proctor as in court, the officer taking down the testimony as delivered. The attendance of witnesses may be compelled by subpœna as at trials in court.

The examination is in public and the questions are put orally as on trial.

The early practice, conformably to the usages of the civil law and admiralty courts was to conduct these examinations in private, no one being present but the officer and the witness. Written interrogatories furnished by the parties were most generally used, and were put literally by the officer, he only giving such explanations as would enable the witness rightly to understand the inquiry.

If the modern practice is better calculated to search into and extract the full knowledge of a witness, it is also liable to abuses, and when not conducted by professional gentlemen skilled in the science of evidence and exercising towards each other and the officer due respect and forbearance, such examinations are not unfrequently attended with gross irregularities and disorder.

The city examinations are almost invariably before commissioners, the judges of the different courts being pressed with too many more urgent duties, to allow them the time ordinarily exacted in these proceedings.

These commissioners have no power to control the course of examination, or even to enforce order in the proceedings, being no more than amanuenses to note down whatever the witness says.

The misapprehensions and misinterpretations likely to occur in heated controversies, where parties and counsel are contending without any present power to restrain them, not only perplex and obstruct the officer in the performance of his duty, but are also too apt to drive a witness out of a plain and ingenuous statement of facts, and to crowd into the deposition a mass of extraneous and frivolous matters. Emphasis is sought to be given unessential things, and details of proof are drawn out upon points collateral to the main issue, if not in themselves wholly irrelevant and immaterial.

The officer is required to write down every question with the answer, and not unfrequently a cross re-direct and re-cross examination, leads to reiterations of questions and answers, swelling up the proceedings to a most inconvenient magnitude, and exacting from the court a laborious analysis of involved depositions, in search of evidence bearing upon the issue.

The officer has the right to suspend his examinations because of disorderly conduct in his presence by parties or their counsel, and report the matter to the court.

This might afford an adequate correction when the examinations are within the jurisdiction of the court, but as they are also frequently beyond that, there is no sure remedy, other than such as may be applied by the intelligence of the bar in a better matured method of preparing and conducting these examinations.

The court on objection by either party excludes from taxation all irrelevant and palpably superfluous details in the depositions, and order has been taken to that effect, without motion, when the irregularity was palpably apparent.

When the deposition is completed, the officer if in the district delivers it to the clerk's office, personally :—if taken out of the district, it is to be sealed up by the officer and forwarded immediately to the clerk.

The statute contemplates the delivery of the deposition to the court and its being opened in court.

The manner of doing this, however, is wholly matter of form. It is in fact handed the clerk, and on a mere intimation from him that there is a deposition, &c., and inquiry whether it shall be opened, the order is given without any inspection by the court.

A delivery to the clerk, is in effect delivering it to the court, it being placed on file, the only mode of putting it in possession of the court. The rules accordingly prescribe, that the deposition may be filed in term or vacation, and that an order be entered of course, (as of a special sessions, if in vacation,) that it be opened and copies given out.

Notice must be forthwith given by the party filing the deposition to the opposite proctor, and all objections to the form or manner in which it was taken will be regarded as waived, unless served upon the proctor filing the deposition, within four days after it is opened. In suits by the United States a formal motion to the court, to open the deposition is necessary.

Opening the deposition will not preclude an objection on trial to the competency or relevancy of the proofs. (Rules 113, 114, 115, 116.)

The same rules apply to filing and opening commissions.

Commissions to examine witnesses abroad are obtained in two modes, one in conformity to the practice of the circuit court, and the other by direct application to the court or judge in vacation. (Rule 105.)

When the latter course is pursued, the notice must be made within four days after claim or answer perfected—or after answers to interrogatories by either party, when propounded, are perfected, if it is intended that the commission shall stay proceedings. (Rule 105.)

On a proper case shown, the court will grant a commission

at any time after the suit is commenced, or after a default or interlocutory decree. (Rule 105.)

If a formal motion is made, an affidavit is to be prepared and served on the opposite party, with a notice of the motion. The affidavit must state the facts expected to be proved, and the shortest time within which the party believes the testimony can be taken and the commission returned. (Rule 106.)

The notice of motion must give the names and residences of the witnesses, and of the commissioners proposed.

If the opposite party admits in writing that the witness or witnesses will depose to the facts stated in the affidavit, the commission shall not operate as a stay of proceedings. (Rule 107.)

The admission may be read on trial and shall have the same effect, as a deposition to the fact by the witness named. (Rule 107.)

No more than one commissioner, will be appointed by the court but by consent of parties or on special cause shown, nor will costs be taxed for the services of more than one except where a greater number is required by both parties. (Rule 108.)

The commission is ordinarily executed with greater despatch, and equal accuracy and impartiality when the responsibility is placed upon one, and care is taken to select a competent person.

Parties may unite in a commission, or each sue out a separate one. The latter course is not encouraged, when the witnesses could be examined without inconveniency by one.

Both parties draw out their interrogatories direct and cross, and file them with the clerk.

They need not be submitted to the judge for approval, unless the parties disagree upon them.

There is no great object in a preliminary reference to the judge, for it is usual to permit the party almost an *ad libitum* range in his questions, because of his ignorance of the witnesses and uncertainty as to the facts within their knowledge. Little more therefore will be exacted by the judge in settling

the interrogatories than that they have relation to the allegations in the pleadings.

A skilful and circumspect draftsman will however avoid a multitude of random interrogatories as tending to load the proceedings with useless expenses and to induce a loose and indefinite mode of answering by the witness.

An interrogatory should be succinct, perspicuous and direct—keeping within the allegations of the pleadings and seeking matters material to the case of the party.

Cross interrogatories must be delivered within four days after the direct are received.

If no notice of reference to the judge is given within five days thereafter, each party will be held to have assented to the interrogatories served. (Rule 110.)

Both sets must be laid before the judge at the same time for settlement, and only one day's previous notice of the reference is necessary. (Rule 109.)

When the interrogatories are complete they are filed with the clerk, who will immediately thereafter make out the commission, attaching the interrogatories to it, and deliver it to the party suing it out.

The writ, the interrogatories and instructions, should be engrossed with great accuracy and in a hand-writing perfectly distinct and legible.

Too little regard is paid this particular. The proceedings are hurried off, obscurely written, and not unfrequently defaced with erasures and interlineations, and when brought back to the court, contrast most unfavorably with the neat and accurate manner in which the returns are executed abroad.

Not only is the reputation of the profession and the court, but the country itself in some degree implicated in this matter, trivial as it may at first seem, for the papers emanate from a national tribunal, in the name of the President of the United States, addressed often to public functionaries abroad—subject to translation in foreign languages and to be inspected and acted upon by foreign judicatories. It would be quite natural, under such circumstances, that those proceedings

should be regarded there as formed and sanctioned directly by the government officials at home. It is not without painful regret that papers of this character, when brought into court here, after their circuit abroad, are sometimes found prepared in so slovenly and illegible a manner as to require decyphering by an expert here, before they can be used in our own courts.

The instructions accompanying the commission are drawn by the proctor, in whose name it issues, and in plain brief terms direct the commissioners abroad how to perform their duties and make returns. (Rule 112.)

The printed form used in the supreme court of this state embodies the substance of all the instructions necessary to be given.

Commissions executed in the United States may be addressed to the clerk, the title of the cause being endorsed on the back, and returned by mail, and they may be sent abroad and returned in the mode of conveyance usually adopted in letter correspondence between the city of New-York and the place where the commission is executed. (Rule C. C. 50.)

Parties may avail themselves of the circuit court rules, and have a commission issued without application to the court or judges. (C. C. Rules 41—50.)

Four days' previous notice of the intention to take out the commission must be given in writing, with the names of the commissioners and witnesses. (C. C. Rule 42.)

In whichever manner the commission is sued out, it is to be drawn and engrossed by the clerk, or if it is prepared by the proctor, the clerk must carefully examine and approve it, before he affixes the seal. (Rule 214.)

He will be entitled to the same fees as if the commission is drawn by him. (Rule 214.)

The testimony of witnesses within the United States, and above one hundred miles from the sitting of the court, are most generally taken by deposition; that of witnesses out of the United States, always by commission.

When opposition is made by local authorities abroad to

the execution of a commission, or there is well founded grounds to apprehend such opposition, the court may be moved for letters rogatory, to be addressed to the court of admiralty within whose jurisdiction the witnesses are to be found.

This procedure though rarely used, because the mutual necessities growing out of commerce and navigation, have removed almost all impediments to the execution of commissions in all mercantile countries, yet it might be rendered, if carried into general use, more efficacious and expeditious than a commission.

Interrogatories accompany letters rogatory, as they do a commission. The judge to whom the letter is addressed compels the attendance of the witnesses designated in his court, and orders their examination before examiners appointed by him, to be taken on the interrogatories.

The depositions are filed in that court and authenticated copies are returned to this with the interrogatories.

The advantage of the control of the court over reluctant or refractory witnesses, and the employment of skilful and competent officers for taking the examination is secured by this mode of proceeding. But an unwillingness to obtrude upon foreign tribunals a business constantly increasing in magnitude, has deterred our admiralty courts from employing this method of obtaining evidence, except in cases of paramount necessity.

If it is desired to impeach witnesses to depositions, or to show their incompetency, exceptive allegations setting forth the objection, may be filed, at any time within four days after the depositions or commissions are filed in the clerk's office:—notice being forthwith given the opposite party of the exception. (Rule 117.)

Impeaching proofs may be taken in the same way as evidence in chief.

The court will not stay proceedings to let in this kind of evidence, unless it be satisfactorily shown, that the party seeking it could not by due diligence, have obtained it sooner.

So also testimony impeaching or supporting witnesses examined on deposition or commission, may be given by the respective parties on the trial of the cause, either orally or by deposition. (Rule 118.)

Exceptive allegations for that purpose need not be filed, when no stay of proceedings is asked.

Official certificates, under the seal of an American consul abroad—authenticated proceedings of foreign admiralty courts —proclamations and public acts of our own and foreign governments in relation to maritime matters—a ship's papers— and the printed laws and reports of courts in the United States and foreign commercial states, are read in evidence in this court, without other authentication.

Depositions *in perpetuam rei memoriam* to be used in this court, may be taken before any officer authorized to take depositions to be read in the courts of the United States, in like cases and by like proceedings as is now authorized in the supreme court of the state of New-York. (Rule 119.)

Oral testimony is taken on hearing in the same manner as in trials at common law, with the exception, that in the trial of any cause the decree in which may be appealed from, if either party shall suggest to and satisfy the court, that probably it will not be in his power to produce the witnesses there testifying, before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk. (Act of congress, Sept. 24, 1789, Sec. 30.)

In such cases the notes of the judge by assent of the parties, may be substituted for the taking by the clerk. (Rule 125.)

And if the testimony is taken by the clerk, he is not to write down word for word, questions and answers, nor is it necessary to have the testimony taken by him, subscribed by the witness, as has been sometimes practiced, but the clerk will proceed rapidly noting the facts sworn, conformably to the practice on common law trials. (Rule 124.)

If either party conceives the notes of evidence taken by the judge or clerk inaccurate, he may within two days after

the hearing, serve on the opposite proctor a written statement of proofs, which if assented to, or if no amendments thereto are proposed within two days thereafter, shall be regarded the true minutes of the testimony given, and the notes of the judge or clerk shall be corrected in conformity thereto. (Rule 126.)

If amendments are proposed to the statement and not agreed in by the parties, they shall be referred with the statement to the judge forthwith, and he shall determine how the facts are, and the statement thus settled shall be filed as the true minutes of the testimony given. (Rule 127.)

SECTION XVI.

Hearing or Trial.

The hearing of a cause, is presenting the pleadings, proofs and arguments of advocates to the consideration of the court and submitting the whole matter to its decision.

The decrees of assignation to hear sentence and to infer:—the monition to either party to hear sentence, &c., are not employed in this court. Causes are brought to hearing directly by notice only.

Usually the notice is in writing, four days previous to the hearing, (Rule 121,) and a note of the pleadings and date of the issue must be served on the clerk, also four days before the time of hearing: the notice to him specifying the pleadings and papers on file, required to be produced on trial. (Rule 122.)

When no proctor is employed, or he resides out of the city, affixing the notice conspicuously in the clerk's office is sufficient service. (Rule 121.)

The notice may be given for any day in term, including days to which the court may have been adjourned, on adequate excuse furnished for not noticing for the first day in term. (Rule 120.)

As however it is a cardinal object with maritime courts to carry causes to a termination with all reasonable celerity, other means are supplied each party for facilitating their despatch.

The pleadings being usually exchanged or delivered in open court, either party may, when a general issue is thus joined on the return day of process, have the cause placed *instanter* upon the calendar. It will then be called in its place for proofs or hearing without other notice. (Rule 85.)

So also a respondent or claimant may notice the cause for hearing on his part, so soon as issue is joined (giving four days' notice) and unless the libellant also notices it for the same term and proceeds to trial on his part, the claimant or respondent will be entitled to a decree dismissing the libel with costs. (Rule 123.)

All proceedings in admiralty causes, may be had at the special sessions, the same as the stated term. (Rules 12, 138, 139.)

There being thus a sitting of the court every week in the year, and oftener when necessary, no cause need delay the speedy determination of suits unless it be, that the necessary proofs are not at the immediate command of the parties.

The hearing is conducted similar to trials at common law or in equity.

The pleadings are read or stated to the court by the respective advocates, and the depositions and documentary evidence are then read on each side.

Witnesses are called, and the direct and cross examinations *vive voce*, conducted as on jury trials, short minutes of the testimony being taken by the judge and counsel as it is delivered.

The English order of proceeding is not adhered to, as a witness may be recalled and re-examined *ad libitum* by either party in explanation of his previous testimony or to meet new circumstances developed in the progress of the evidence.

The cross examination need not immediately follow the diroct:—a party by waiving it for a time and subsequently recalling the witness to pursue it, does not thereby make him his witness.

Generally the advocate commencing an examination upon either side, is required to complete it and his associates are restrained from taking part in it. The reason upon which the rule was framed may have been that the course of examination was supposed to have been previously carefully studied with reference to the allegations of the pleadings—the character and connection of the witness and other circumstances of important bearing, all that this preparation being common to the counsel, all would be apt to pursue it on an examination, thus leading to the offering of the same series of interrogatories, by whichever counsel the questions might be propounded.

If such foundation ever existed for the rule, it is very difficult to discern any trace of its influence in modern practice.

Counsel seem most commonly to be made first acquainted with the witnesses and facts in a cause at the trial, and questions are thrown out at random, irrespective of order or connection and slightly, if at all adapted to meet the habits, prepossessions, or state of mind of the witness.

As was hinted in a previous section, we might take most instructive lessons in this department of our profession from the masters who taught two thousand years ago, and the court, the bar, and the rights of parties would be most advantageously benefitted, by rendering this branch of the science more philosophical and exact.

Great benefit would be derived from oral as well as written interrogatories framed in a perspicuous, compact and logical manner, bearing pointedly upon the material parts of the case, and so direct in terms as to leave no important fact unrevealed upon the mind of an honest witness, or to afford room for concealment to an evasive one.

The proofs being completed, the case is argued to the court. If two counsel speak on each side, they address the court alternately, the order of opening and closing the argument being the same as at law. (C. C. Rule 100.)

The court at the instance of either party will adjourn the argument a reasonable time after the testimony is closed, to

enable counsel to arrange the facts and law of the case, but the postponement will not be beyond the term, except by consent of both parties, or some special exigency renders it necessary or proper.

The civil law provided an exemption to parties from having their causes tried by a judge interested in the matter, or who did not stand indifferent between them.

As in accordance with the strict order of that practice, the judge or judges would be assigned by the prætor after contestation of suit, or all the pleadings and proofs perfected on paper, and would stand in relation to the cause, essentially in the place of our jurors, probably the exception to the competency of the judge would be appropriately if not necessarily offered at the final hearing.

The causes of exception recognised by that law and the ecclesiastical practice, would not probably all be available in objection to a judge commissioned as under our system of jurisprudence.

Still there are circumstances specifically pointed out by statute, under which the district judge would not be allowed to sit in a cause; "if he is any ways concerned in interest or has been of counsel for either party, or is so related, or connected with either party as to render it improper for him in his opinion, to sit on the trial, he shall on application of either party, cause the fact to be entered on the records of the court, with an order to certify the same to the next circuit court," &c., &c. (Act, March 3, 1821, Sec. 1.)

No means are pointed out for coercing the action of the judge in this behalf, but probably some process from the circuit court might at least prevent him proceeding to adjudicate in the cause, if ineffectual to transfer it to the circuit court.

Causes are also transferred to the circuit court for trial, when the district judge is disabled from holding his court. (Act, March 3, 1809, Sec. 1.) This is effected by an order in the nature of a *certiorari*, issued by the circuit judge on the application of the district attorney or marshal, (*ibid.*) but in-

dividual suitors are not empowered to take any step in effecting it.

The only remedy that would seem to meet the case, if a party has the right to except to the judge, would be to obtain a writ of *mandamus* or *inhibition*, staying his acting in the cause and compelling him to have the proper entry made on the records, that the proceedings may be certified to the circuit court.

No provision is made by statute for a like disability in the circuit judges, and as where less than $2000 is in demand their jurisdiction is exclusive, there would be a no less urgent importance that the law should designate or recognise a sure relief to parties, in case grounds of exception exist, without referring them to the delicacy or feeling of propriety of the judges themselves, for protection.

No subject of complaint or suspicion has ever been known to exist, since the establishment of the judiciary under the United States' constitution, but a system cannot be regarded complete that may not supply a remedy relieving judges as well as suitors from all apprehension that the administration of justice may be swayed by improper partialities.

The application to the district judge to forbear deciding in the cause and so to place it that it may pass to the cognizance of the circuit judge, would be properly made when the cause is brought on to hearing.

SECTION XVII.

Decrees.

The series of preliminary orders and decrees conducing to the final decree in the cause, employed in the English admiralty and ecclesiastical courts, and which also for a long period obtained in the colonial admiralty, are no longer in use here.

We conform in our practice more nearly to the civil law,

which recognised only *interlocutory* and *definitive* decrees. The interlocutory having regard to the direction or proceedings in a cause, and comprehending default or contumacy, and the definitive, to its final decision and determination.

Accordingly the *primum*, *secundum* and *tertium* decrees, the decrees leading to and concluding the various proceedings—so numerous in the practice of the ecclesiastical courts and the English admiralty, are all comprehended and effectuated here, in the default, or interlocutory and final decree.

The pleadings and proofs being concluded, the judge renders his decree thereon, either *instanter*, directing the clerk to enter upon the minutes the proper order, or in cases of weight or difficulty, reserves the case for consideration. No order of continuance or adjournment of the cause is requisite for this purpose.

The court takes all the documents and depositions used on trial and receives the briefs or written arguments of the advocates, upon the law or the facts, when voluntarily furnished.

It is also usual, when any specific order is sought by either party, for both to submit to the judge the form of a decree, such as each supposes his case may entitle him to ask. When the decision is made, the judge either draws out the decree in terms, or furnishes minutes of the points decided, and directs the clerk or the proctors to draw up the form, but it must be again submitted to the judge and receive his approval before the clerk can enter it.

It is quite usual to *motive* the decree, that is, spread out upon its face a succinct summary of the considerations upon which it is founded.

Even when a detailed opinion is delivered, this summary marks with more precision and certainty the points adjudicated. The opinion of the judge is often found entered at large on the minutes of the colonial court. The decree is always rendered in open court: but it is quite usual, to hold special sessions for the purpose of entering decrees, upon cases reserved for consideration, and not delay parties until the recurrence of a stated court. No particular formality attends rendering decrees. Sometimes the court indicates the terms of

a decree, or pronounces an opinion—at others, an announcement merely is made that the cause is decided, and the judge hands the papers and decree to the clerk, and the decree is thereupon entered in court.

The decree is however, subject to modification, at the suggestion of either party, so as to render it definite, or to correct any accidental error, until enrolment, or the formal signing of the decree.

In cases of condemnation of vessels, goods, &c, the decree of condemnation is itself signed by the judge and filed: but in ordinary suits, the whole proceedings in the cause are enrolled by the clerk, and the judge signs the enrolment alone. The decree however may be executed before the enrolment, because it takes effect from entry *apud acta*, the enrolment being nothing more than embodying in connection and form, the pleadings, proofs and orders in the cause, ready for transcription in case of appeal, or to remain on file a record of the acts in the cause.

When the decree is in an appealable cause, it cannot be executed until ten days have elapsed, that time being allowed the parties to enter an appeal. (Rule 152.)

If no appeal is then entered, and the decree is not fulfilled and satisfied, the party obtaining it may proceed to its execution. (Rule 145.)

He has two modes of enforcing it—by suing out the appropriate writ of execution, (Rule 146,) or by forfeiture of the stipulations. (Rule 145.)

In order to proceed on the stipulations, an order of court must be entered, after the ten days have expired, (which is an order of course, except on stipulations to the United States on bonding property seized,) that the sureties cause the engagement of their stipulation to be performed, or show cause in four days or on the first day of jurisdiction thereafter, why execution should not issue against them, &c. (Rule 145.)

This order must be served on the proctor of the principal party, and if no sufficient cause is shown at the time appointed, a summary decree will be rendered against the sureties on their stipulation, on which decree execution may forthwith

issue against the goods and chattels, lands and tenements of the stipulators. (Rule 145.)

An appeal entered within ten days and duly proceeded upon, operates an entire stay of proceedings in the court below. The court below has however so far jurisdiction over the proceedings until transmitted to the court above, as to allow amendments in matters of form, or to rectify mistakes or omissions, to the same extent it could, if the proceedings were remitted from the court above for the purpose of amendment.

If the appellant does not enter his appeal within ten days after the decree; or file the stipulation required within twenty days; or have the proceedings transcribed within thirty days, in either case, the decree below may be executed as if no appeal had been entered. (Rules 152, 153, 155.)

But the court on special motion may vary these terms in aid of the appeal. (Rule 155.) The decree must always conform to the allegations of the pleadings.

The practice of this court is not to render a decree *in personam* on a libel *in rem*, but if the case proved, shows a clear right to a recovery against the person, (whether the action *in rem* is sustainable or not,) the libellant will be permitted after decree to introduce the proper allegations *in personam* and proceed thereon.

Care will however be taken that no surprise or advantage is allowed against the defendant, by means of such change of the direction of the action.

Full notice must be given him of the change of proceedings; and although his appearance in the action *in rem*, places him so within the jurisdiction of the court, as to authorize it to mould the action conformably to the justice of the case, his stipulators will not be bound for any act or proceedings out of the suit *in rem*.

So also, if the defendant does not appear to answer or contest the action in its direction *in personam*, like proceedings must be taken to bring home notice to him, as on an original institution of a suit.

After such steps have been taken, the court will hear and adjudicate the matter upon the proofs already before it, or

upon the hearing of such further evidence, as either party may be allowed on motion or petition, to introduce.

SECTION XVIII.

Rehearing and Review.

After a cause has been decided, the failing party not unfrequently entertains an expectation that the result may be changed if the court can be brought to reconsider the case. The more protracted and earnest the litigation, the more fixed is the losing party, in the persuasion that his proofs and allegations have not been duly weighed and appreciated. Applications pressed with great urgency, are accordingly constantly brought before the court, to obtain a rehearing in controverted cases.

This has led to the adoption, in almost every system of jurisprudence, of some principles which may serve as a check against too great a facility in this respect, and at the same time may allow manifest errors in the court to be recalled, or frauds or irregularities in parties to be rectified, without the delay and expense of appeals or writs of error to some other tribunal.

It has thus become a familiar usage with courts, whilst a cause is in progress, to modify or revoke interlocutory orders, &c., whenever demanded by the manifest justice of the case.

So also after definitive sentence pronounced, the decree may be reconsidered, re-opened, vacated or otherwise varied, during the same sitting of the court, which usually embraces the entire term in which the decree is rendered, including also the adjournments by which the sitting may be prolonged.

All courts, proceeding according to the course of the civil law, (except courts of chancery,) have limited the exercise

of this revisory power to the particular term or session in which the decree or decision is made, and refuse to entertain motions or petitions to open causes for re-examination, at any period subsequent to the close of such sitting.

If however a stay of proceedings is obtained from the court or a judge during the term, the final decree is considered thereby suspended, so that the motion or petition for rehearing may be offered at a subsequent term. (Rule 156.)

A rehearing is not granted as of course, and accordingly special cause must be shown on the motion or petition.

A copy of the reasons or grounds of the motion must be served on the proctor of the opposite party with notice of the intended motion.

This notice must be four days unless the court or judge direct a shorter time, and then a copy of such mandate must be served with the notice.

Unless the decision is palpably erroneous, the court hears an argument upon the motion for reconsideration.

The court of chancery, by virtue of its full jurisdiction over parties and their rights and estates, has a practice of opening anew and rejudging cases already decided, without regard to the limitation of the term in which the decision was made.

This is done by a *Bill of Review*, and the jurisdiction is no doubt in many instances most salutary and convenient.

It is exceedingly questionable, whether courts proceeding strictly in consonance with the rules of the civil law, ever entertain bills of review when addressed to the same tribunal which rendered the decision: but as it is an established usage in modern practice for a court to reconsider and rectify its own decisions, it would seem to be mere matter of form whether the procedure is upon an original bill of review, or on motion or petition.

The relief sought would be the same in either mode, and the principle which would allow it on petition or motion, would equally apply to the application though made by bill of review. No doubt the courts would discountenance the formal and expensive proceeding by bill, where a motion would

secure the same remedy, by imposing all the costs on the party thus creating them, and therefore it is not to be expected, that this particular form of remedy will be much employed.

The important consideration is whether a party may file his bill of review in admiralty subsequent to the term in which the decree is pronounced.

In appealable cases he cannot, (Rule 157,) but the great proportion of cases fall within the exclusive jurisdiction of the district or circuit court, and if this mode of relief cannot be allowed, a suitor is finally concluded after a term has elapsed, whatever equity on his own side, or fraud on the part of his adversary, may be brought to light.

There would seem to be an urgent necessity then that courts of admiralty should exercise in a modified degree their equity powers in recalling decrees which had improvidently passed, or were obtained by irregular or fraudulent practices.

The rule of this court inhibits bills of review unless presented before the enrolment of the decree or the return of final process thereon. (Rule 157.) The cause, possibly, may be regarded as still pending to a degree, until the ultimate action of the court for enforcing the decree, and in that way an equitable control over the parties and the rights determined by the decree may exist with the court.

The power, however, will only be exercised by the court, when no relief by appeal can be had, and the declaration of the court of last resort upon the subject, imports that in this country, courts of admiralty cannot in any case sustain such bill filed subsequent to the term in which the decision is rendered.

The relief if yielded could be by no means commensurate with that obtained in chancery. The court of chancery by force of its general equity powers, might recall rights or interests passed into enjoyment or possession under an antecedent decree, having full jurisdiction over the parties and the subject matter: the equitable powers of admiralty courts could never be claimed to extend further than to act upon parties and suits not yet entirely out of the forum, and even

then there will be found difficulties in the matter which may lead, whenever the subject comes under solemn adjudication, to excluding the procedure from our practice.

This would not in principle be so much because the judgment term has elapsed, as on account of the inefficiency of the powers of admiralty courts to effectuate the objects of a bill of review.

The notion is purely technical and artificial that the continuance or termination of the particular term in any manner controls or enlarges the powers of the court.

The idea was drawn from the civil law which regarded the judge or court *functus officio* as to the cause decided, after the particular sitting in which the decision was given. Though a sentence was pronounced, it remained subject to the control of the tribunal during, and no longer than the actual period the judge occupied his seat.

When in more modern times these sittings were arranged into allotted periods with fixed commencements and terminations, they were called *terms*, and the entire period, by a fiction of intendment, regarded as a continued sitting of the judge or court, and the power over the cause was extended, by force of this construction, to embrace the full term.

The press of business or conveniency of suitors or courts, has in more recent times led to removing the limitation of these terms in many instances, and leaving the closing of them to the discretion of the court. This is so in all the circuit and district courts of the United States, and as every adjourned sitting falls within the term out of which the adjournment was made, many of the courts in practice (and all might at the discretion of the judge) now have their terms prolonged nearly throughout the vacations, and might easily run one term into the succeeding one, so that the court within the present acceptation of the rule, would be in sitting and competent to entertain bills of review notwithstanding this nominal restriction.

Besides the court or judge might, on petition or motion, at the term in which judgment is given, continue over to the next, the privilege of filing the bill.

The practice therefore has not been introduced or has fallen into disuse in admiralty courts, not necessarily on account of the limitation of time, but probably much more because the circumscribed power of the court, disables it from affording the degree of relief the case might require.

SECTION XIX.

Appeals.

THE acts of congress, Sept. 24, 1789, Sections 22, 23, 24; April, 1803, Sec. 2, give the right of appeal from a district to a circuit court from final decrees in all cases of civil and maritime jurisdiction where the matter in dispute, exclusive of costs, exceeds fifty dollars, and from the circuit to the supreme court when it exceeds $2000.

Within these respective limits the decisions of the inferior courts are final.

Appeals to the supreme court are rare. Within the last twelve years not one has been taken from this circuit in an admiralty cause. Either, controversies are for sums less than required to give that court jurisdiction, or parties prefer the matter should be concluded by the prompt decision of the court below, to incurring delay and expense in pursuing a more satisfactory judgment in the court of last resort.

An appeal may be brought at any time within five years, and the courts have no power to restrain or counteract it.

Yet clearly it should not be necessary that proceedings should be suspended in appealable cases that period of time to ascertain whether the right would be exercised. Such interruption of proceedings would be a flagrant delay of justice.

Courts accordingly regard it within their competency to prescribe the time and manner the appeal shall be instituted,

so as to protect the opposite party from needless costs and delays.

No appeal lies but from a definitive sentence, and the decree is regarded definitive, when it is ready for execution without further interference on the part of the court. (Rule C. C. 119, 120.)

Still all interlocutory orders conducing to the main decree are re-examinable by appeal after final decree rendered, although *grievances* resulting from interlocutory orders do not of themselves afford ground for appeal in our practice. Our course is different from that of the civil and canonical courts in this respect.

Intermediate orders often affect the interests of parties most essentially, such as, directing a surrender of property under arrest—enhancing, mitigating or discharging stipulations—denying amendments—disallowing pleas or demurrers, &c., &c.—but as the courts above do not receive causes in fragments, it is necessary to carry out the interlocutory order to one final and definitive before a revision of the matter can be sought by appeal.

When parties sever in their defence in cases of tort; or if their interests are wholly distinct in cases of contract, as for wages, or other cause of action in its nature several, (as salvage, &c.,) each party may sustain his separate appeal.

But ordinarily in cases of contract, the appeal must be by the libellants jointly, and by all the respondents charged either personally or in interest by the decree.

And if in cases severable, more than one prosecutes an appeal, the court above will compel a consolidation, that there need not be distinct hearings and judgments in the respective cases.

An appeal is entered, in the first instance, in the court appealed from, by serving on the opposite party and the clerk a notice in writing entitled in the cause, that the party appeals therein. (Rule 152. C. C. Rule 118.)

The clerk files this notice of the day it is delivered and at the same time notes on the minutes, "*appeal entered.*"

The old mode of issuing an *inhibition* to the court below, and then a *monition* to transmit proceedings, and also giving in a *libel of appeal*, is superseded by a more succint and simple procedure in the present practice.

If the appeal is not entered within ten days after the decree rendered, execution may issue. (Rule 152. C. C. Rule 134.)

Within ten days after the appeal is entered stipulation must be given to respond in such damages and costs as may be decreed above, in default of which stipulation, the party may proceed to execute his decree. (Rule 153. C. C. Rule 136.)

The proceedings in the court below, which are to be transmitted to the court above, must be transcribed within thirty days after the appeal unless longer time is allowed. (Rule 153. C. C. Rule 136.)

Appeals within the district and circuit must be made in writing. (C. C. Rule 118.) But they need not be made in open court.

By the civil law they might be made orally in open court *apud acta*, immediately following the decision, and the practice in some of the districts of the United States now is of a similar tenor. And it would seem the more appropriate and convenient course in appeals to the supreme court from the circuit, as a citation is unnecessary, when the appeal is prayed at the term the decision is rendered, and is allowed in open court.

So soon as the final decree is rendered, either party may proceed to a review of it.

The appeal has a double action, one in the court rendering the decree and the other in the court above, and it accordingly is in effect addressed to both courts.

The simple act of indicating a purpose to review a decision, is in no way mandatory or coercive on the court giving the decision, and therefore it is not necessary the intention to appeal should be brought to the notice of the judge or court at all, unless to seek his aid in expediting it.

The party against whom proceedings have become final in the district court has a right to transfer them to the circuit court and have a trial *de novo* there;—as to the right itself, each court is entirely passive; it does not emanate from them, nor can they deny its exercise, and therefore no petition to either as

for a favor in their discretion to grant or withhold, is necessary—nevertheless as to the manner in which the right is to be made available, each court performs an important ministry.

The signification of the appeal to the clerk and party affords the appealing party ten days therefrom, to prepare for perfecting it. (Rule 153. C. C. Rule 136.) And accordingly all proceedings in the court below stay that time. Within that time the appeal addressed to the circuit court is drawn up in writing and signed by the party or his proctor, stating in brief terms, the prayers or allegations of the parties to the suit in the district court in the proceedings in that court, and the decree with the time of rendering it. (C. C. Rules 118, 119.)

This appeal must futhermore state whether the appellant intends to make new allegations in the court above—to pray different relief there from what was sought in the court below, or if it is designed to seek a new decision on the facts. (C. C. Rule 119.) This statement is conclusive on the appellant.

A copy must be served on the proctor of the appellee, the same day the original is filed with the clerk of the district court. (C. C. Rules 118, 120.)

At the time this statement is filed with the clerk, or at the farthest, within ten days from the entry of the appeal, the appellant must file security by stipulation, to respond in damages and costs if decreed against him—giving four days previous notice to the appellee or his proctor of the names and residence of his sureties, and of the time and place the stipulation will be executed. (Dist. Rules 154.)

If the appeal is not entered so as to stay proceedings, or the appellant does not desire a stay, he need not give a stipulation for damages, but for costs above only.

Should the court below attempt to proceed in the cause after the appeal and stipulation have been filed in due time, the appellant may apply to the circuit court on motion, giving four days' previous notice, for a writ of *inhibition* to the district court staying proceeding, which will be awarded, when circumstances require. (C. C. Rule 128.)

If the clerk or court below delay the return of the appeal

to the circuit court, an unreasonable time, a writ of *mandamus* may be obtained in the same manner, compelling immediate execution of the appeal. (C. C. Rule 129.)

Although the appeal duly entered and perfected stays proceedings on the decree, until the apostles are filed in the court above, yet the court below may make all necessary orders for the safe keeping of the property under arrest, or making good the stipulations on file.

It is not necessary to await the sitting of the circuit before the appeal can be brought into the court; it may be filed at any time after the transcripts are prepared.

Within four days after the return is completed by the clerk, the appellant must cause to be filed in the circuit court, the notice of appeal with the affidavit of service of a copy thereof, and also the documents required to be returned with the appeal. (Rule C. C. 124.)

If this is omitted, the appellee may apply to the clerk for a certificate of the facts, and on filing it in the district court, the appeal shall be deemed deserted and shall not afterwards be received in the circuit court. (C. C. Rule 124.)

The appellant may always obviate the hazard of such default, by leaving instructions with the clerk to file the appeal and transcripts in the circuit court, so soon as they may be completed. The court would then relieve the party from the consequences of a neglect of the clerk, should any occur.

The circuit court becomes fully possessed of the cause from the time of filing the appeal and transcripts therein. (C. C. Rule 125,) and accordingly all incidental applications in relation to the cause, must after that period be addressed to that court. The property, funds, stipulations, &c., follow the cause to the circuit court, and the district court can no further interfere in it.

The appellee has two days in term after the return, to enter his appearance, and if he neglects doing so, the appellant, on affidavit of service on him of notice that the appeal and return were filed, may proceed *ex parte* in the cause. (C. C. Rule 126.)

Any new party interested in the matter may intervene after appeal, in the same manner as before.

The appellee is not required to file new securities, his stipulations below in terms covering the chance of an appeal of the cause. Nor is it usual here, for the appellant to give fresh security after the cause is transferred to the circuit; the stipulation filed in the district court on entering the appeal, and coming up with the proceedings, in addition to his stipulations before given, is all that is exacted, unless the court should be satisfied of the inadequacy of that security. In such case the circuit court could exercise the usual jurisdiction of compelling competent sureties. (Dis. Court Rule 55.)

The proctors below are regarded as continuing such after the appeal, unless there is a formal renunciation or substitution.

The appellee is required to enter an appearance above, only as a bar to proceedings *ex parte*, or to relieve the appellant from the delay of monitions to come in, &c., employed in civil law courts.

After the appellee's appearance is entered by the clerk, and made known to the proctor of the appellant, notices, &c., must be served as in the court below.

When a new hearing of the cause is sought by the appeal, no change of pleadings is necessary, and the cause proceeds in all respects as if originally commenced in the circuit and carried forward there to the same point of advance. (Rule C. C. 127.)

Each party may notice the cause for hearing. This notice will be for the ensuing term when the appeal is filed in vacation, and for the same term, if filed in term time. (C. C. Rule 127.)

Proofs are taken, when the witnesses are within the jurisdiction of the court and able to attend, as on the first hearing; the depositions and *viva voce* evidence given below, being used here, only in case the attendance of the witnesses cannot be commanded. It is most usual however for parties to consent to receive the proofs already given, and to occupy the court above only in taking new proofs.

But either party may avail himself of the answer of the

other to interrogatories in the court below, although new pleadings have been filed. (C. C. Rule 132.) And so written evidence taken under the same or other pleadings, may be read, (*ibid.*) but that is confined to cases in which the evidence would be admissible below in the absence or inability of the witness to attend.

After the proceedings are carried up, if the appellant intends to make new allegations or seek different relief from what was asked below, he must within ten days file his libel attested on oath.

Within twenty days thereafter the appellant must file his answer thereto under oath; but either party may have an enlargement of these periods by order of one of the judges of the court at chambers. (C. C. Rule 131.)

If the appellant makes default in filing his libel, the appellee may thereupon move for and obtain, without notice, a decree pronouncing the appeal deserted. If the default lies with the appellee, the appellant may by like motion have such decree *ex parte* as his case may justify. (C. C. Rules 131, 127.)

The procedure in the circuit after libel and answer filed, is conformable to the practice of the district court. (C. C. Rule 132.) Accordingly like notices are to be given and the testimony is to be obtained and rendered in like manner.

The circuit court having entire possession of the cause makes the same decision the district court ought to have made, and enforces the execution of its own decree, and it may also allow any amendments of defects of form but not of substance occuring in the court below, which could have been amended there. But when the appeal is from part of the decree only, the rights of a party below, not affected by the part appealed from, will not be interfered with by the court above. It is not necessary to remit the cause to the district court for further proceedings, after final decision in the appellate court, nor before such decision, unless it may be to have amendments in matters of substance, or diminution in the apostles supplied.

The matter of costs rests in the discretion of the court. In

the English admiralty, it is not usual to give costs on the reversal of the decision below; but costs are allowed on affirmance.

In the supreme court of the United States costs are decreed the prevailing party as a general rule, both on reversal and affirmance of the decision appealed from, except that costs are not allowed for or against the United States, and that practice is most generally adopted in the circuit. (S. C. Rules 46, 47, 48.)

Where the decree below is modified only, costs are apportioned between the parties, decreed wholly to the appellant, or awarded against him, according to the nature and equities of the particular case.

The proceedings on hearing appeals in the circuit is the same as in other cases, with the exception, that a special note or entry is to be made of every objection taken to the admissibility of proofs, documents, &c., otherwise the benefit of the objection cannot be had on appeal to the supreme court. (Sup. Court Rule 32.)

No more than two counsel are heard on either side, and they address the court alternately. (C. C. Rule 100.)

Each party respondent or claimant having a distinct and independent interest, may be heard by his own counsel.

Appeals to the supreme court from a circuit court, or district court acting as a circuit court, are subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error. (Act of March 3, 1803, Sec. 2.)

The appeal is entered in the same form as from the district to the circuit court.

The appeal is accompanied by a citation to the opposite party, to appear and defend against the appeal in the court above; and the court will not hear the cause *ex parte*, until after thirty days from the service of the citation.

The citation is signed by a judge of the circuit court, and at the same time he must take from the appellant a bond and sufficient security, that the appellant shall prosecute his appeal to effect and answer all damages and costs if he fail to make his appeal good. (Act Sept. 24, 1789, Sec. 22.)

But no citation need be signed if the appeal is prayed at the same time the decree is pronounced and is allowed in open court.

The mode of taking security on appeal and the time of perfecting it, are exclusively within the jurisdiction of the court below.

The appeal will be dismissed, when it appears by the transcript of the record that no appeal bond was taken by the judge who signed the citation in the cause. The bond, however, need not be taken at the same time the citation is signed, though that is the usual and most convenient practice.

The district judge cannot sit in the circuit court, or at least take part in the judgment or appeal from his court, but it is competent for him to sign a citation and take the bond on the appeal from the circuit to the supreme court.

Upon the appeal, a transcript of the libel, answer, depositions and other proceedings in the cause, is transmitted to the supreme court. (Act March 3, 1803.)

And if it is necessary or proper in the opinion of the presiding judge in the circuit court, that original papers should be inspected in the supreme court, they will be received and considered above in connection with the transcript, and the judge may make such order for their safe keeping, transporting and return, as he may deem proper. (S. C. Rule 25, February, 1827.)

When an appeal may lie to the supreme court from a decision made in the circuit, the decree cannot be executed until ten days have elapsed from the time it was filed or the decision pronounced. (C. C. Rule 134.)

The property and funds in court, however, do not follow the cause but remain in the circuit court, subject to its charge and supervision, whilst the cause is in progress above.

The cause is heard in the supreme court upon the proofs, allegations and proceedings certified by the clerk under his hand and the seal of the court below to that court with the appeal. (Sup. Court Rule 11.) And all the proceedings must accordingly be in writing, in the court below.

The supreme court at its discretion will however admit *further proofs*, and when the equity of the case is plain, but the pleadings are substantially defective, will remand the cause with directions, that proper allegations be introduced.

The pleadings after being amended or reformed in mere matters of form in the circuit court, go back to the supreme court, either by force of the remittitur, by the express order of the circuit court, or by action of the parties, under the operation and effect of the appeal. But if the suit was dismissed in the supreme court for want of jurisdiction, they will only be heard again on a new appeal from such decree as the circuit shall render on the amended pleadings.

If it does not appear upon the face of the return that the matter in dispute exceeds the sum of $2000, the appellant may establish that fact by affidavit, serving on the opposite party or his counsel a copy with notice of motion
days previous to its being offered to the court. (Sup. C. Rule 13, August, 1800.)

If the sum decreed in the circuit exceeds $2000, that fixes the jurisdiction. So on the part of the libellant, does the demand in his libel of above that sum. But it is doubtful whether the respondent can appeal, whatever amount is demanded, when the decree is for less than $2000, unless the libellant also appeals.

When several claimants have distinct interests in the aggregate above $2000, but no one has an interest exceeding that sum, no appeal can be sustained; nor in suits for wages, though the aggregate recovery be ever so large, unless each libellant recovers above $2000.

The pleadings, documents and depositions go up with the appeal, and in order also to transmit the oral testimony received in the circuit court, the appellant must, within four days after the decision is pronounced or filed below, unless the time is extended by the judge, make up and serve on the opposite party a statement of the *viva voce* testimony on trial, and also make plain and proper references therein to the written evidence. The opposite party shall within four days after the same is served propose amendments thereto, or he

shall be held to have acquiesced in the statement and it will thereby become the proof to be returned. If amendments are proposed, they must, with the statement, be submitted by the appellant, unless he adopts them, to the judge for settlement. The same when settled shall be engrossed by the clerk, and with the written evidence shall be deemed the proofs on which the decree was made. (C. C. Rule 135.)

Entering the appeal and having the statement of proofs settled, operate a stay of further proceedings in the circuit court. (C. C. Rule 135.)

In admiralty cases the cause after appeal is in the supreme court precisely as in the court below.

The death of either party pending an appeal does not abate the cause.

The process then is, for the proper representatives to offer themselves and be admitted parties to the suit, and the cause then proceeds as in other cases.

If however they do not come in voluntarily, the other party may suggest the death on the record, and have an order, on motion, that unless the representatives become parties within the first ten days of the ensuing term, the respondent may have the appeal dismissed, or that the appellant may proceed *ex parte.*

The order must be published three weeks in the official paper at Washington, at least sixty days previous to the term of the court. (Sup. Court Rule 28, February, 1821.)

On filing the record in the supreme court the appellee must give the clerk a bond with surety in $200, to respond costs—or deposit that amount in bank, to the order of the clerk. (S. C. Rule 38.)

When the decree appealed from is rendered thirty days previous to the term of the supreme court, the appellant must docket the cause and file the transcript with the clerk within the first six days of term. (Rules 21, 41.)

And it cannot be received after that, except upon the terms that the same shall stand for argument during the term or be continued at the option of the appellee. (S. C. Rule 42.)

In case of his neglect the appellee may then file the transcript and docket the cause, and it shall stand for trial as if the

appellant had done it in proper time. (S. C. Rule 29, Feb. Term, 1821. Rule 41, Jan., 1835.)

But the appellee may at his option produce a certificate from the clerk of the circuit court stating the cause, and that an appeal had been duly allowed therein, and thereupon have the cause docketted and dismissed. (*Ibid.* Rule 41.) No motion to dismiss a cause can be made before it is placed on the docket.

The appellant cannot afterwards docket the cause, except by order of the court or counsel of the defendant. (Rule 32. January, 1836.)

And if the cause is docketted by either party after the first thirty days in term, it will stand continued to the next term. (S. C. Rule 43.)

The record must be filed and contain within itself, without reference *aliunde*, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing. (Sup. C. Rule 30.)

And the clerk is required to have fifteen copies of the record printed for the use of the court, (S. C. Rule 39, Jan., 1831,) one of which he shall deliver to each party. (Rule 40.)

No case on the calendar will be heard until the parties shall have furnished the court with a printed brief, or abstract, containing the substance of the material pleadings, facts and documents, and the points of law and fact, intended to be presented at the argument. (S. C. Rule 27, Feb., 1821.)

If any incidental motions in a cause, not docketed, are to be made, they must be in writing. (S. C. Rule 51.) And be made on Saturday of each week before the court shall have entered upon the hearing a cause upon the docket. (S. C. Rule 33.)

No more than two counsel will be permitted to argue for either party before the supreme court. (S. C. Rule 23.)

On the second day of term, the cases are called in their order on the docket, for argument. No more than ten causes will be called in any one day.

The cause will be heard, when called, if either party is ready; otherwise it will go to the foot of the calendar, unless some good cause is shown to the contrary, and if twice called

and passed in its order, and put at the foot of the docket, it will then, if not again reached during the term, be dismissed, but if a printed argument is filed for either party, it will be equivalent to an appearance by counsel. (S. C. Rule 44.)

No cause is taken up out of its order on the docket or set down for any particular day, except under special and peculiar circumstances to be shown the court. (S. C. Rule 35, March, 1830.)

On the argument, no objection will be allowed to the admissibility of any deposition, deed, grant, or other exhibit in the record or evidence, unless such objection was taken in the court below and entered of record. (S. C. Rule 32, Feb., 1825.)

But when there is an omission in certifying the evidence, and it appears by the record that it was used or offered below, such omission may be supplied and brought up on *certiorari* alleging diminution. And the circuit court will allow evidence not received in time to be made part of the case to be put upon the record, after appeal, with a memorandum of the fact. No other parties will be heard on appeal, than those who appear such upon the record: nor can the claim of joint captors in prize cases, be received in the supreme court, after appeal.

An appeal dismissed for informality may be renewed within five years from the time the decree below was rendered.

The supreme court on reversal, will render such decree as the court below should have rendered, except where the reversal is in favor of the libellant and the damages to be awarded are uncertain, in which case, the cause is remanded for final decision. (Act, Sept. 24, 1789, Sec. 24.)

The decree of the supreme court is remitted with a mandate to the court below, and the proceedings of the circuit upon that mandate are again subject to appeal. Nothing however comes upon such further appeal, that had been previously before the supreme court and was disposed of, the former proceedings always being before the court so far as they have any bearing upon any new points or rights in controversy between the parties. After dismissal of a decree for defect of the record, it may be reinstated if it is found that

the error is a mere clerical mistake, and the mistake being rectified below, the cause will proceed without a new appeal.

The important distinction in the procedure on appeal in the supreme court and in the circuit court is, that the latter after being possessed of the cause may proceed therein as if it had original jurisdiction of the matter; but the supreme court only reviews and acts upon the specific points decided in the court below. And except in cases of prize, or seizures for forfeiture, never receives further proofs in the cause.

SECTION XX.

Special Motions.

VARIOUS instances have been pointed out under the different procedures in which incidental relief may be had by motion or petition during the progress of the cause.

Proceedings in admiralty being regarded as in open court, applications to the judge in vacation are rarely made, except for his mandate in cases specifically required by the rules in respect to bail—the character of process to issue,—period of its return, &c., or where the power is given explicitly by act of congress. When however the cause is to be arrested, the proceedings varied, or delayed, or other collateral jurisdiction exercised, appeal is made to the court at a stated or special sessions and most usually on notice to the opposite party.

The notice must always designate the object of the application, and when to be supported by matters extrinsic the pleadings, or minutes of court, must be accompanied with a copy of those matters.

Four days before it is to be brought on, it must be served on the proctor of the opposite party, or if he has none, be posted conspicuously in the clerk's office.

The rule of notice does not however apply to the party proceeded against, he being allowed at the hearing to bring forward any proofs or objections in opposition to the motion

without serving a copy or notice thereof on the adversary party. This reply proof is usually shaped to meet exactly the case of the party moving, and as there can be no disclosures enforced, he may thus defeat the application when a full dicovery of facts within his knowledge, would have insured a different result. Advantages are possessed in this respect by the party against whom the motion is made, and the production at hearing, of unexpected statements or proofs leads to constant applications for leave to introduce rebutting evidence, or to a renewal of the motion *de novo* upon evidence intended to supplant that exhibited against it. The court most commonly refuses to permit the actor to bring in reply proofs, especially on deposition, as this would tend to a conflict of affidavits, taken *ex parte* on both sides without the restraint of the court, or that of a cross-examination.

When then the proofs in opposition in the first instance counteract the case upon which the motion rests, it is usually discharged by the court without allowing further contestation.

Still in cases of urgent equity or hardship or surprise, the actor will be permitted to bring in further evidence on his side, not being his own deposition, or being of a documentary or record character; but that liberty is not extended to the other party, further than to permit him to answer any original or new ground of relief introduced in such further evidence.

The decision in court on motions is final, not subject to appeal or rehearing after the close of the term: but decisions by a judge out of court, may be appealed from, or the matter may be moved anew before the court.

In the circuit court this affords the advantage of a rehearing and examination by two judges, but in the district court the distinction between decisions in vacation and at term are merely technical and fanciful, and in practice is rarely, if ever, acted upon. Although the decision will not be re-opened for hearing or correction, yet the court will after the term, on motion or petition, grant a further order for the completion or execution of the first.

Counsel are heard the same as on argument of issues of law

or fact, and proctors are not allowed to make or oppose special motions before the court, nor strictly can they argue before a judge in vacation, but unless exception is taken to their appearance it is often permitted *sub silentio*. Costs are at the discretion of the court or judge, and when each party establishes a probable cause for invoking a decision upon the matter, costs are not allowed to either as against the other.

Sometimes proceedings by motion are original and independent of any suit in pendency, as for ordering a survey of vessels with a view to a sale by decree of the court, or by the master under his authority as such, or at the instance of seamen because of unseaworthiness, &c., &c., but most commonly motions not founded upon the pleadings or antecedent acts of parties, are auxiliary to the action in prosecution, as for the sale of perishable goods in custody of the court—or vessels subject to claims of great magnitude compared with their value, and incurring expenses, which may absorb the proceeds, or at least subtract largely from the remedies of those holding privileges.

When motions of this character are *ex parte*, the proof must be full, that all reasonable diligence has been used to bring notice home to those interested in the matter.

Motion for the sale of perishable goods, or vessels in custody, may be made on the return day of the attachment, and *instanter* without notice if the parties interested are present in court; otherwise the usual previous notice must be given.

A sale is made under the usual process of execution, but no writ is employed in this court for carrying into effect antecedent proceedings.

In some districts the admiralty courts issues a writ commanding a survey of ships or goods, and the ultimate decree is founded upon the return of such writ.

That is not the usual practice here.

The order directing the survey and nominating the surveyors, is the authority under which the duties are performed, and after proceedings may be taken upon the certificate of the surveyors when filed.

In case of an adversary or hostile proceeding, (as on a sur-

vey of vessels on the application of seamen,) a writ may be taken out in the first instance if there be apprehension of opposition or resistance to the execution of the order.

The writ is issued by the clerk on the order of the court, or the mandate of the judge in vacation.

No day or particular period is set apart in the circuit or district court for hearing motions. They are to be noticed for the first day of term, unless some excuse is shown for not doing so, and will generally be heard every morning before entering upon jury causes or calendar cases.

In the supreme court, Saturday of each week before calendar causes are called, is assigned as the period for making special motions. (Rule Sup. C. 45.)

SECTION XXI.

Costs.

Costs in the civil law, are not fixed rates of compensation appointed by law, but as incidents of the cause are weighed and pronounced upon by the judge with other points arising for decision.

Regularly the losing party ought to pay expenses to the successful one as a part of the damages or injury he has sustained, and they were so awarded unless it appeared that the unsuccessful party had probable and just cause for contending.

The usage passed into the canon and the admiralty and vice admiralty courts, and the sentence besides the disposition of the principal point always contained a condemnation of costs or expenses.

Some of the colonial vice-admiralty courts in America arranged tables of fees and transmitted them to the king and council, and when approved there or affirmed by the high court of admiralty, were applied as fixed rules of decision;

others, it is supposed, left the rate of compensation to be passed upon in each case by the court.

As the same judge was constantly called upon to adjudge or tax costs, he would naturally seek a uniformity in his allowances where the services were similar, and thus in the canon, chancery and admiralty courts it is found that services of a like kind were compensated alike in all cases.

These usages soon introduced tables or schedules of fees to the different officers of court, which like other precedents, were regarded as of authority in the respective courts.

This seems to have been the foundation of the allowance of costs in the vice admiralty court of this colony. No authoritative regulation upon the subject is now to be found.

Under the express directions of the king and council, ordinances were adopted by the provincial governor, Hunter, in 1715, fixing the fees for all the courts in the province, except the admiralty.

No mention is made of the latter court, although it was then exercising a most extensive jurisdiction.

It was undoubtedly considered independent of the colonial authorities, not only because the judge or commissioner was commissioned directly by the king, with a designation of his jurisdiction, but because several provinces were brought under his jurisdiction.

Thus in 1699 one judge was commissoned for New Hampshire, Massachusetts, Rhode Island, Connecticut and New-York, and in 1701, for Connecticut, New-York and East and West New-Jersey.

Costs were taxed in this court conformably to these usages or at the discretion of the judge until after the revolutionary war.

In 1789 the legislature of this state adopted a fee bill, applicable to the court of admiralty. (2 Smith and Livingston Laws 417. 2 Greenl. 225.)

It seems not to have varied essentially the allowances which had before prevailed, except perhaps in the perquisites of the judge: and the description of processes in a suit to which fees are allotted, indicates clearly that then

(in the language of the act of congress passed a few months subsequently,) "the forms and modes of proceeding" were "according to the course of the civil law."

The act of congress, (Sept. 29, 1789,) provided that the rate of fees should be the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such cases: and thus applied to this court, after its organization under the United States' constitution the fee bill established by the state in February previous.

This act of congress expired in 1792, and no subsequent statute has established a rate of fees for proctors and advocates. Those of the marshal and clerk are defined, and a fixed compensation is also given the district attorney for particular items of his services, but those of proctors and advocates are left as before, to the regulation of the respective courts.

This leads to a great diversity of allowance in the different districts of the United States, each court probably conforming in a good degree to the usages of the local courts in like cases.

This court has uniformly taken the state act as the basis, and has taxed the costs of advocates and proctors as nearly in conformity with its provisions as the course of proceedings would admit. This, both because from 1789 to 1792 it was the law of the court, and had thus introduced into its practice under the highest sanctions, the course of allowances before made, and also for that it is essentially the same as the tariff of fees previously in use with the court, and if any difference is discovered when the services are the same, the rate appointed by statute is the one that obtains.

When the clerk was appointed a taxing officer, (probably about the year 1812,) the then circuit and district judges adopted a schedule of fees which were to guide him in his taxations.

There has been no official ratification of that tariff by the present judges, but on informal references to them by the clerk, and also on appeals from his taxations, it has been re-

cognised and acted upon as essentially the rate of allowance for both courts.

Some items were added to the list by this court in 1828 that were before probably comprehended in specific allowances awarded by way of damages or expenses.

A list of fees, in conformity to which the clerk now taxes, will be found in the Appendix. Allowances may be made in addition to these items, for any new and indispensable service in a cause, but the compensation in such case must be specifically determined by the court, and cannot be introduced by taxation.

Although, therefore, there are now no fees directly appointed by act of congress to parties, their advocates and proctors, yet the frequent mention of costs and recognition of the right and liability of parties to receive and pay them, in various statutes, afford the strongest implication that congress intended to leave it to the courts of admiralty to regulate and enforce costs according to their accustomed course of procedure, even if the act of 1792, will not admit the construction of granting such power in terms.

There must be an actual award of costs in the sentence of the court or none can be taxed the party.

As the more general course, they follow the event of the suit and are imposed upon the party against whom the decree is rendered on the merits, but this is not an inflexible rule.

In suits by seamen for wages, costs are not awarded against them although unsuccessful, if they show a probable cause of action.

They are frequently denied a successful party employing the expensive proceedings of this court, when the remedy would be equally efficacious at law, and there is reason to infer that the choice was made to punish the opposite party with costs.

All unnecessary amplifications of pleadings will be at the cost of the party making them, without regard to the event of the cause. (Rules 77, 7.)

If separate answers or claims are put in by the same proctor or by proctors connected in business, all costs thereby

unnecessarily incurred will be disallowed on taxation. (Rule 90.)

In summary actions the restriction is more rigid still as to costs, (Rules 169, 172, 177,) and costs can only be recovered therein for processes indispensably necessary to the progress of the suit.

If a proctor multiplies proceedings in a cause so as to increase costs unreasonably and vexatiously, he may be required by order of court to satisfy any excess of costs so incurred. (Act July 22, 1813.)

The court may consolidate actions when prosecuted for the same cause, and no costs are recoverable for more than one suit in libels against a vessel or cargo if the several might be joined in one, unless special cause for different actions be shown in open court. (Act July 22, 1813.) If however several claims are interposed in such case to one libel, the costs incident to the various claims will be allowed. (*ibid.*)

In addition to ordinary costs, counsel fees may be allowed at the discretion of the court, either as damages or a necessary part of the expenses of the suit. The compensation by taxed costs being liberal in this court, extra counsel fees are not awarded unless peculiar reasons are shown the court.

The disbursements made by a party necessary to the progress of his cause are ordinarily allowed as costs, but costs in taking proofs on commission or deposition, cannot be taxed beyond a fixed rate, whatever the actual expenditure may be. (Circuit Rules 44, 96.)

In the English practice after a decree for costs is pronounced, the party entitled to them applies for a citation for the other to show cause why they should not be taxed. When the party is declared in contumacy upon the citation, the judge taxes costs in penalty of the contumacy, &c.

In our practice the bill of costs is prepared by the proctor and served on the opposite proctor with notice of taxation. This notice is equivalent to citation.

The clerk in the first instance taxes all costs, except those in which he is interested, (Rule 160. Circuit Rule 94,) an appeal from his taxation may be taken *instanter* by either par-

ty to the judge out of court, but no costs are allowed to either party on such appeal. (Circuit Rule 97.) A further appeal on taxations in the circuit court, may be made from the judge to the court, but this is always under penalty of costs if the appellant fails therein. The final decree of the district court giving costs above $50, will be subject to appeal; but no summary appeal from the taxation of the judge in vacation is allowed to that court, or to the circuit court.

If a party obtains a taxation without four days notice to the opposite party, a retaxation at his expense will be ordered on the application of the one against whom the taxation was obtained. (Rule 159.)

The taxed bill must be filed with the clerk before payment is made. (Rule 159.)

This is because in admiralty causes all moneys are paid out of court, and the files should exhibit vouchers for the payments, and also that the bill may be accessible to any party having an interest in the matter, to ascertain whether any improper exactions have been made.

The fees of the clerk, marshal and district attorney are fixed by act of congress. (Feb. 28, 1799.)

When services are performed by these officers not enumerated in the act, a like compensation is made them, as is allowed in the supreme court of the state for like services, or as was taxed according to the usage of this court before the act was passed.

The marshal having the custody of all vessels and goods seized by any officer of the revenue, is to be allowed such compensation therefor as the court may judge reasonable. (Act May 8, 1792, Sec. 4.)

The usage of this court since that act was passed, has been to allow one dollar and fifty cents per day for the custody of the vessel, besides the actual disbursement for a keeper placed on board.

A commission was also allowed for the custody of goods. These allowances are now regulated by stated rules, having regard to the extent of the marshal's responsibility and the term it continues, and are made applicable to attachments by

individual suitors equally as to seizures by the United States. (Rules 49—53.) The allowance is subject to modification by the court on motion and notice. (Rule 52.)

The court of a neighboring government, remarks upon this subject, that the ordinary fees allowed in admiralty are not large and those sums which seem most to startle by their large amount relate to the custody of the property, a duty which does not devolve upon other courts of justice in their ordinary proceedings.

These charges may be in a great degree avoided or diminished by proper diligence on the part of those interested.

The property may be bailed immediately on arrest, and before the return day of the attachment, (Rules 41, 60, 61,) and the costs therefor, advanced, in the first instance, are to be deposited in court and will be returned in case the libellant fails in his action. (Rule 68.)

Every cause may also be heard and determined on the return of the monition; all delay beyond that time is the fault of the suitors themselves, as each party can compel the other to proceed on pain of a decree against him, (Rules 85, 123,) or in petty causes, bearing all expenses incurred by a delay granted at his instance. (Rule 171.)

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APPENDIX.

RULES

OF THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

SOUTHERN DISTRICT OF NEW-YORK.

RULE 1.

A libel, information, or petition, must state plainly the facts upon which relief is sought, without any repetitions or amplification of charges.

RULE 2.

No process shall issue until the pleading or statement in writing upon which it is allowed be duly filed.

RULE 3.

Libels, (except on behalf of the United States,) praying an attachment *in personam* or *in rem*, or demanding the answer of any party on oath, shall be verified by oath, or affirmation.

RULE 4.

The oath, or affirmation, of the party himself, in all cases where one is necessary, shall be required to pleadings filed in his name, except as is hereafter otherwise provided, or as shall be specially ordered by the judge.

RULE 5.

Libels, informations, or petitions, praying a monition or citation only, without attachments, need not be sworn to.

RULE 6.

Libels, and other proceedings to be filed, shall be plainly and fairly engrossed, without erasures or interlineations materially defacing them. If papers not conforming to this Rule are offered, the clerk shall require the *allocatur* of the judge to be endorsed thereon before he receives them on the files.

RULE 7.

Amendments, or supplementary matters, must be connected with the libel or other pleading by appropriate references, without a recapitulation or restatement of the pleading amended or added to.

RULE 8.

In suits for seamen's wages, any mariner in the same voyage not made a party, may by short petition to the court in any stage of the cause previous to the final distribution of the fund in court, or discharge of the defendant and his sureties, be joined as libellant in the cause, but no costs shall be allowed for the proceedings taken to make him a party.

RULE 9.

The proctor in the original cause shall not, however, be compelled to proceed in behalf of such petitioning mariner, unless a reasonable indemnity is offered for such costs as may be incurred in consequence of his being joined in the cause.

RULE 10.

In case of salvage and other causes civil and maritime, persons entitled to participate in the recovery, but not made parties in the original libel, may upon petition be admitted to prosecute as co-libellants on such terms as the court may deem reasonable.

RULE 11.

Process on libels or informations may be made returnable on any day at a stated or special term, but writs for the sale of property under any order or decree of the court, and all final process, shall be returnable at a stated term, unless upon cause shown an earlier day is specially appointed by the judge.

RULE 12.

Tuesday of each week is appointed as a special sessions of the court, (except the stated term be then in session,) at which the same proceedings may be taken, in causes of admiralty and maritime jurisdiction, as at a stated term.

RULE 13.

Process to be used in commencing suits shall be a *citation* or *monition;* an *attachment in rem*, united with a *monition*, or, by special allowance of the judge, with an *attachment in personam;* an *attachment in personam* and *a writ of foreign attachment.*

RULE 14.

Where no specific process is provided by the Rules, parties may have such process as is in use in like cases in the supreme court of the state.

RULE 15.

Where it is not desired to arrest a defendant, the clerk on filing a libel or information may at the instance of the actor issue a citation or monition, according to the usage in civil and admiralty proceedings.

RULE 16.

No process *in personam* for the arrest of any person, in cases of torts or unliquidated damages, shall issue, except upon the mandate of the judge.

RULE 17.

In cases of liquidated damages, when the certainty and amount of the demand appear upon the face of the libel, an attachment *in personam* may be issued by the clerk without an order. The attachment shall plainly express the cause of action and the amount of the demand, and the clerk shall endorse thereon the sum for which bail is required, not exceeding one hundred dollars above the sum sworn to be due and unpaid; but no attachment or citation shall be issued until the libellant shall have filed a stipulation for costs in the sum of one hundred dollars.

RULE 18.

On the return of a citation or warrant by the marshal "*served personally*," the party shall be deemed in court, and may be proceeded against accordingly.

RULE 19.

When the citation or monition in suits *in personam* is not served personally, the libellant may at his election pursue the defendant to a decree of contumacy, in which decree may be embraced an order for the attachment of the defendant as for contempt of process; or, on verifying by oath the matters demanded by the libel, the libellant may have an attachment *in personam instanter*, on the return of the citation "*not served*."

RULE 20.

In the latter case all subsequent proceedings may be as if the attachment had been sued out in the first instance.

RULE 21.

On warrants to arrest the person in admiralty and maritime causes, the marshal may take bail in the form of a stipulation and in the sum endorsed on the warrant, conditioned for the appearance of the party on the return day to

answer to the libellant in a cause civil and maritime, according to the course of the court.

RULE 22.

The sureties having made oath thereon to their sufficiency, and the bail stipulation being filed, it shall have the same effect in favor of the actor and against the defendant as if taken in court; and the marshal shall be deemed discharged of all personal responsibility for the appearance of the respondent.

RULE 23.

In case the marshal does not file such stipulation, or the sureties, being required, refuse to justify, like proceedings may be taken to compel the marshal to bring in the party, as if no stipulation had been entered into.

RULE 24.

The condition of the stipulation shall be deemed satisfied if the party shall appear in person on the return day of the warrant and submit himself for commitment, or enter into the usual stipulation in the cause, according to the course of the court.

RULE 25.

If a party against whom a warrant of arrest issues cannot be found and return thereof be made, the plaintiff may upon the mandate of the judge have a warrant to attach the property of the defendant, and may also have inserted therein a clause of foreign attachment, according to the course of the admiralty.

RULE 26.

In all cases of attachment under admiralty process to compel an appearance, the attachment may be dissolved on the party's giving a stipulation with sureties, to the same effect as in cases of arrest.

RULE 27.

In cases of foreign attachment, if the defendant appear,

the same proceedings may be had as is usual in suits *in personam*, and if he make default, the court will proceed *ex parte*, and pronounce the proper decree, unless the attachment is discharged at the instance of the garnishee.

RULE 28.

Process cannot issue against goods *choses in action* or moneys in the hands of third persons, except by the order of the judge and upon due proofs of the claim first made; and the names of such persons and also that of the persons whose effects are to be attached, together with a specification of such effects, shall be expressed in the process.

RULE 29.

On the service of the attachment by arrest of property, the parties holding the property or funds attached, shall on the return day of such process file an affidavit containing a full and true statement of the property or funds in their hands belonging to the principal party at the time the attachment was served and at the time the deposition is made, and declare whether they have any, and if any, what claim to any and what part thereof; and shall then, on motion of the actor, pay into court such amount as they shall not claim, or as may be ordered by the court, or give stipulation, with sufficient surety to abide the further order or decree of the court in relation thereto; and on their default in this behalf a rule may be entered that an attachment issue against them unless they shall show cause in four days or on the first day the court is in session afterwards.

RULE 30.

When the property, effects or credits named in the process are not delivered up to the marshal by the garnishee or trustee, or are denied by him to be the property of the party, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such trustee, or at his residence or usual place of business, unless the libellant shall by competent surety indemnify the marshal for arresting the property pointed out to him.

RULE 31.

On the return by the marshal of service of such attachment by notice and copy with the reason thereof, the libellant may move the court for a peremptory attachment or such order as the equity of the case may demand; or on proof satisfactory to the court that the property, &c. belongs to the defendant, may proceed to a hearing and final decree in the cause as if the property had been held in arrest.

RULE 32.

All process to the marshal shall be returned on the return day thereof, and if he shall not return the same in four days after being required in writing so to do, by any party or his proctor, upon affidavit of such requirement and of the delivery of the process to him, an order may be entered of course that he show cause why an attachment shall not issue against him; and in the case of process *in rem*, the return of the marshal shall express the day of the seizure of the property or the day of sale, if a process for that object.

RULE 33.

No process shall be received on file unless duly returned by the officer to whom directed.

RULE 34.

In case the court is not in session at the return of process requiring to be acted on in open court, proceedings shall be deemed continued to the next sitting of the court, (either stated or special,) at which time the like proceedings may be had thereupon as if then returnable.

RULE 35.

On proclamation after due return of process, the libellant shall be entitled to a decree of default or contumacy, according to the nature of the case, and the three proclamations heretofore used are abolished.

RULE 36.

In case of the attachment of property, or the arrest of the person in causes of civil and admiralty jurisdiction, (except in suits for seaman's wages when the attachment is issued upon certificate pursuant to the act of Congress of July 20, 1790,) the party arrested, or any person having a right to intervene in respect to the thing attached, may upon evidence showing any improper practices or a manifest want of equity on the part of the libellant, have a mandate from the judge for the libellant to show cause *instanter* why the arrest or attachment should not be vacated.

RULE 37.

Stipulations may be taken, in admiralty and maritime causes out of court before the clerk or a commissioner, under a *dedimus potestatem*. The officer taking the stipulation shall, if required by the opposite party, examine the sureties on oath and decide as to their competency. An appeal may be taken *instanter* to the judge, in case the decision is against the sufficiency of the sureties.

RULE 38.

The conditions of stipulations in causes *in personam* shall be that the principal, whenever required by this court or an appellate court in case of appeal, shall appear and answer to the cause or to interrogatories, and pay all costs that may be decreed against him, and by the respondent or defendant that he will also perform and abide all orders and decrees in the cause interlocutory or final, or deliver himself personally for commitment in execution of such orders, to the proper officer.

RULE 39.

The amount of stipulations on the part of the defendants in causes *in personam*, shall be the sum endorsed on the warrant, and *in rem* on the delivery of property attached the appraised or agreed value of the property seized, unless

the sum in either case is modified or enlarged by order of the court.

RULE 40.

Application may be made *instanter* to the judge after an arrest *in personam*, to mitigate the amount of the bail stipulation; and like application may be made at any time after property has been delivered on bail stipulation, upon facts occurring after such delivery, to discharge such stipulation or to reduce the amount according to the equity of the case, previous notice of the application having been given the proctor of the libellant.

RULE 41.

Two days' notice shall be given the proctor of the libellant, of applications for delivering up on stipulation property under attachment, specifying the sureties intended to be given and their occupations and places of residence and the officer before whom and the place where the stipulation will be offered, except in suits by seamen for wages, when such notice may be *instanter*.

RULE 42.

The stipulation or bond to be given upon releasing and delivering up property arrested by process of the court, shall be conditioned that the claimant and his sureties shall at any time upon the interlocutory order or decree of the court, or of any appellate court to which the cause may proceed, and on notice of such order to the proctor of the party to whom the property shall have been delivered bring into court the appraised or agreed value of such property or any part thereof so ordered or decreed. If no proctor is employed by such party, the order or decree shall be deemed peremptory two days after the same is entered.

RULE 43.

The clerk shall provide a book in which shall be registered

all stipulations filed in causes civil and admiralty which shall be open to the examination of all parties interested.

RULE 44.

No process *in rem* shall be issued, nor shall any appearance or answer be received or third party be permitted to intervene and claim, unless a stipulation in the sum of two hundred and fifty dollars shall be first entered into by the party and at least one surety resident in the district, conditioned that the principal shall pay all costs awarded against him by this court, or in case of appeal, by the appellate court.

RULE 45.

But seamen suing *in rem* for wages in their own right and for their own benefit for services on board American vessels, and salvors coming into port in possession of the property libelled, shall not be required to give such security in the first instance. The court on motion with notice to the libellants may, after the arrest of the property, for adequate cause order the usual stipulation to be given in these cases, or that the property arrested be discharged.

RULE 46.

Notice of the arrest of property by attachment *in rem*, in behalf of individual suitors, shall be published and affixed in the manner directed by act of Congress in case of seizures on the part of the United States, except when the judge by special order directs a shorter notice than fourteen days; and except that, instead of the *substance* of the libel a short statement of its purport may be given.

RULE 47.

Notice of sale of property after condemnation in suits *in rem*, (except under the revenue laws and on seizure by the United States,) shall be six days, unless otherwise specially directed in the decree of condemnation and sale.

RULE 48.

All such notices shall be published in the manner directed

by act of congress, in the case of condemnation under the revenue laws.

RULE 49.

The marshal shall be allowed, (in conformity to the former usage of the court,) one dollar and fifty cents per day for the custody of a vessel, her tackle, apparel and furniture, seized by any officer of the revenue, and seized, libelled and prosecuted for forfeiture.

RULE 50.

He shall be allowed for the custody of goods so seized, on all sums not exceeding $5000, held in custody less than thirty days, two per cent; on all sums exceeding $5000, held in custody less than thirty days, one per cent; on all sums not exceeding $5000, held in custody over thirty days, two and a half per cent, and on all sums exceeding $5000, held in custody over thirty days, one and a half per cent: except on attachment of specie, bullion, jewelry or precious stones, the allowance to the marshal shall be specifically fixed by the court, having regard to the special circumstances of each case.

RULE 51.

The marshal may have like allowances taxed on all other attachments of property in causes of civil and admiralty jurisdiction.

RULE 52.

All the above allowances are, however, subject to alteration by the court on motion, due notice thereof being given the opposite party and adequate cause being shown therefor.

RULE 53.

The allowance to the marshal above appointed for the custody of goods, shall be computed upon the gross proceeds in case of sale; or upon the appraised or agreed value if bonded: but the marshal in case of an agreed valuation between the parties not assented to by him, may have an appraisement in the usual mode.

RULE 54.

If attachments *in rem* are accompanied by written instructions to the marshal specifying the sum demanded (adding thereto $250 to cover costs) he shall as in case of executions, only arrest so much of the goods or effects to be seized (when severable) as shall be sufficient to satisfy such amounts.

RULE 55.

In all cases of stipulations in civil and admiralty causes, any party having an interest in the subject matter may move the court on special cause shown, for greater or better security, giving the opposite party two days notice thereof, unless a shorter time is allowed by order of the judge.

RULE 56.

After a citation or monition or warrant of arrest in suits *in personam* returned "*served personally,*" if the defendant do not appear at the return day he shall be deemed in contumacy and in default, and the libellant may take order for enforcement of the stipulation (in case any is given) or to compel the defendant's appearance according to the course of admiralty proceedings: or at his option may proceed to hearing *ex parte* and obtain the proper decree, unless the court for good cause shall allow the defendant further time.

RULE. 57.

In suits *in personam*, stipulators to the marshal on the arrest of the defendant may be discharged from their stipulation on the surrender of the principal, as in cases of bail at law.

RULE 58.

So also stipulators or *fide-jussores* after the return of the attachment, in suits *in personam*, may surrender their principal, or he may surrender himself, in discharge of the stipulation, as in cases of special bail at law: except in respect to

costs in this court or any other court to which the cause may be appealed.

RULE 59.

All stipulations in causes civil and maritime shall be executed by the principal party (if within the district) and at least one surety resident therein, and shall contain the consent of the stipulators, that in case of default or contumacy on the part of the principal or sureties, execution to the amount named in such stipulation may issue against the goods, chattels and lands of the stipulators.

The court will modify the execution as to the time it may stay and the amount to be collected, according to the equity of the case. Non-resident parties must supply at least two sureties.

RULE 60.

In case of seizure of property in behalf of the United States, an appraisement for the purpose of bonding the same may be had by any party in interest, on giving one day's previous notice of motion before the court or the judge in vacation for the appointment of appraisers.

RULE 61.

If the parties or their proctors and the district attorney are present in court, such motion may be made *instanter* after seizure and without previous notice.

RULE 62.

Orders for the appraisement of property under arrest at the suit of an individual, may be entered of course by the clerk at the instance of any party interested therein, or upon filing the consent of the proctors for the respective parties.

RULE 63.

Only one appraiser is to be appointed in suits by individuals, unless otherwise specially ordered by the judge, and if the respective parties do not agree in writing upon the appraiser to be appointed, the clerk shall forthwith name him,

either party having a right of appeal *instanter* to the judge from such nomination, for adequate cause.

RULE 64.

In case vessels, their tackle or appurtenances, are to be appraised, the clerk shall name a warden of the port, and in case of merchandise, an appraiser or an assistant appraiser of the custom-house, as appraiser.

RULE 65.

In suits *in rem* for seamen's wages and in all other actions *in rem* for sums certain, the claimant or respondent may pay into court the amount sworn to be due in the libel with interest computed thereon from the time it was due to the stated term next succeeding the return day of the attachment and the costs of the officers of court already accrued, together with the sum of $250 to cover further costs, &c. &c ; or, at his option, may give stipulation to pay such sworn amount with interest, costs and damages, [first paying into court the costs of the officers of court already accrued,] and in either case may thereupon have an order entered *instanter* for delivery of the property arrested—without having the same appraised.

RULE 66.

Appraisers before executing their trust shall be sworn or affirmed to its faithful discharge before the clerk or his deputy (who are hereby appointed commissioners for the qualification of appraiser's,) and shall give one day's previous notice of the time and place of making the appraisement, by affixing the same in a conspicuous place adjacent to the United States' Courts Rooms, and where the marshal usually affixes his notices, to the end that all persons concerned may be informed thereof and the appraisment when made shall be returned to the clerk's office.

RULE 67.

Appraisers acting under an order of this court shall be severally entitled to three dollars for each day necessarily

employed in making the appraisement: to be paid by the party at whose instance the same shall be ordered.

RULE 68.

No vessels, goods, wares or merchandise in the custody of the marshal shall be released from detention upon appraisement and surety, until the costs and charges of the officers of this court, so far as the same shall have accrued, shall first be paid into court by the party at whose instance the appraisement shall take place, to abide the decision of the court in respect to such costs.

RULE 69.

No property in the custody of any officer of the court shall be delivered up without the order of the court: but such order may be entered of course by the clerk on filing a written consent thereto by the proctor in whose behalf it is detained: and also, after appraisement and bond duly executed.

RULE 70.

If in *possessory* suits after decrees for either party the other shall make application to the court for a proceeding in a *petitory* suit and file the proper stipulation, the property shall not be delivered over to the prevailing party until after an appraisement made, nor until he shall give a stipulation with sureties to restore the same property without waste in case his adversary shall prevail in the petitory suit, and also to abide as well all interlocutory orders and decrees, as the final sentence and decree of the district court and on appeal of the appellate court.

RULE 71.

In all cases where a judgment or decree is entered on a bond or stipulation filed with the clerk for the appraised or agreed value of any property libelled in this court, the clerk shall receive in addition to the amount of bond, interest at the rate of six per cent. per annum, for the time which shall intervene between the entry of the judgment or date of the

stipulation and the day when the money shall be paid into court.

RULE 72.

A tender *inter partes* shall be of no avail on defence or in discharge of costs, unless on suit brought, and before answer, plea or claim filed, the same tender is deposited in court to abide the order or decree to be made in the matter.

RULE 73.

When tender is first made, after suit brought, it must include taxable costs then accrued.

RULE 74.

No third party can intervene by claim without proof of a subsisting interest in the subject matter of the claim. This proof may in the first instance be the oath of the claimant, but subject to denial and disproof on the part of the libellant, on issue thereto or on summary petition.

RULE 75.

Double pleas, or exceptions, replications to pleas, triplications or rejoinders, &c., may be filed without previous leave of the court, the pleading of several matters being restricted to cases in which the matters are distinct.

RULE 76.

Defence may be made by answer or claim, of matters of law or fact, without the employment of exceptions or special pleas usual in causes of civil and maritime jurisdiction, other than exceptions to the competency of the party, or the process or other matter of abatement.

RULE 77.

If matter of bar at law to the libel is set up by answer or claim and allowed by the court, no costs shall be taxed for any other part of the answer or claim than that stating such bar.

RULE 78.

When the answer alleges a bar in law to the whole libel, it may be treated as a plea and set down for hearing without filing a replication other than to such bar or going into proofs upon the issues in fact.

RULE 79.

Where a party not required to answer intervenes by claim and answer, costs will be taxed for the claims only.

RULE 80.

When an answer is required in a suit *in rem* of a party having no interest in the subject matter, he may file an exceptive allegation or disclaimer, and notice the same *instanter* for hearing. If the decree of the court is in affirmance of his plea, he shall be discharged the action with costs.

RULE 81.

One improperly joined as defendant in an action *in personam*, may have a decree of discharge in the same manner; provided, it is made satisfactorily to appear to the court that he can give material testimony as a witness in the cause.

RULE 82.

When the claim is in derogation of the right set up by the libel, it may form a general issue therewith by denying "that the libellant is entitled to the remedy and relief in the premises sought by him," without traversing or admitting the several articles of the libel.

RULE 83.

A general issue may be taken by answer in like manner when the answer is not required to be under oath.

RULE 84.

So also the libel may be contested affirmatively by a general issue instead of a formal demurrer.

RULE 85.

When a general issue is taken to the libel in open court on the return day of process, either party may have the cause placed upon the calendar *instanter*, and it may be called in its plea for proofs without other notice.

RULE 86.

Each party is entitled to like proceedings in such case, as if the cause had been noticed by each pursuant to the usual practice.

RULE 87.

A sworn answer is not to be deemed higher evidence than the libel or information to which it responds, unless made so by the act of the promovent. An answer need not be put in under oath unless so required by a sworn libel, or one filed by the United States.

RULE 88.

The matter set up by a sworn answer responsive to the allegations or interrogatories of the libel, shall be deemed admitted on the part of the libellant, unless within four days from the time the answer is perfected or from the expiration of the time allowed for excepting thereto, replication is filed, or a written notice served on the proctor of the respondent, that on the trial of the cause proof will be offered on the part of the libellant in opposition to the allegations of the answer. No replication need be filed for any other purpose to an answer taking an issue in fact upon the allegations of the libel.

RULE 89.

A claim or answer may be put in and filed at any time after

the service of process and before defaults entered: and when it shall be put in at any other time than on making proclamation, notice of the time of filing it shall be given the libellant, otherwise he shall not be bound to regard it.

RULE 90.

If separate answers or claims are put in by the same proctor, or by different proctors being connected in business, all costs thereby unnecessarily incurred shall be disallowed on taxation.

RULE 91.

An answer or claim on the part of the United States is to be put in without oath by the district attorney, and is not subject to exception for insufficiency.

RULE 92.

In the case of bailable process *in personam*, unless the defendant appear and put in bail stipulation according to the rules of the court, his claim or answer may be treated as a nullity and his defaults be entered. An answer in such case shall be deemed filed from the time bail becomes perfected.

RULE 93.

On due proof that a claimant or respondent is absent from the United States, or resides out of the district and more than one hundred miles from the city of New-York, a claim or answer to a libel may be sworn to by a proctor or attorney in fact in behalf of such party. And if thereupon the libellant by written notice to the respondent demands a personal answer verified by the oath of the party, proceedings shall stay a reasonable time to enable such answer to be taken by commission or *dedimus protestatem*.

The provisions of this rule may also be applied to the verification of a libel, by the oath of a proctor or attorney in fact.

RULE 94.

The libellant may within four days from the filing of the answer or claim, file exceptions thereto for insufficiency, irrelevancy or scandal, which exceptions shall briefly and clearly specify the parts excepted to by the line and page of the papers in the clerk's office: whereupon the party answering or claiming shall in four days either give notice to the libellant of his submitting to the exceptions, or set down the exceptions for hearing, and give four days notice thereof for the earliest day of jurisdiction afterwards. In default whereof the like order may be entered as if the exceptions had been allowed by the court.

RULE 95.

The defendant may on the return day of process and before answering, demurring or pleading, file an exception to the libel that it is multifarious or ambiguous, or without plain allegations upon which issue can be taken, and if it be adjudged by the court insufficient for any of these causes, and be not amended by the libellant within two days thereafter, it shall be dismissed with costs.

RULE 96.

Proceedings upon such exceptions shall conform to those on exceptions to answers or other pleadings.

RULE 97.

If a party submit to exceptions for insufficiency, he shall answer further within four days after notice of his submitting. If the exceptions are allowed on hearing, he shall answer further within such time as the court shall direct; and if the hearing of the exceptions shall not be duly brought on, or the further answer duly put in, the claim or answer excepted to shall be treated as a nullity, and the default of the party be entered.

RULE 98.

If exceptions for irrelevancy be submitted to, or be allowed

by the court, or the hearing be not duly brought on by the respondent, the matter excepted to shall be struck out of the claim or answer by the clerk.

RULE 99.

Either party may propound interrogatories to the other, within four days from the putting in of the claim, or answer, or other pleading, and the perfecting of the same, if excepted to.

RULE 100.

A copy of the interrogatories shall be served on the party for whom the same are intended, or his proctor, if one be employed; and if he object thereto, he shall notify the party serving the same, who shall on due notice submit the same to the judge for his allowance. The interrogatories allowed shall be filed with the clerk and notice thereof be given, and the party shall file his answer thereto in ten days after such notice; in default whereof, if libellant, the libel shall be dismissed; if claimant or defendant, the claim or answer shall be treated as a nullity, and default may be entered against such party.

RULE 101.

Answers to interrogatories may be excepted to in the same manner as answers or claims put in by a defendant, and shall in all respects be subject to the provisions of the rules in relation to exceptions; and if the libellant making answers shall not perfect the same after exception, the libel shall be dismissed for want of prosecution. But this rule and the preceding one shall not in any case be deemed to require answers to interrogatories on the part of the United States in suits brought in their behalf.

RULE 102.

The oath of calumny shall not be required of any party in any stage of a cause.

RULE 103.

Suits may be joined or consolidated upon the same principle as in the practice of the court at common law.

RULE 104.

When various actions are pending, all resting upon the same matter of right or defence, the court by order at its discretion, will compel the parties to abide by the decision rendered in one case, and will enter a decree in the other causes conformably thereto, although there be no common interest between the parties.

RULE 105.

Commissions for taking testimony if not sued out pursuant to the rules of the circuit court, shall be moved for in four days after the claim or answer is filed and perfected, (if the same shall have been excepted to,) but if interrogatories shall be propounded for the other party, by the party who moves for a commission, he shall have four days for moving after the answers to the interrogatories shall be perfected, otherwise such commissions shall not operate to stay proceedings: but on a proper case shown, application for a commission may be made at any time after the action is commenced and before issue joined, or after a default or interlocutory decree.

RULE 106.

Affidavits on which a motion for a commission is made shall specify the facts expected to be proved, and the shortest time within which the party believes the testimony may be taken and the commission returned.

RULE 107.

A commission will not be allowed to stay proceedings if the opposite party admits in writing that the witnesses will depose to the facts stated in such affidavit; such affidavit with the admission may be read on the trial or hearing, and will

have the same effect as a deposition to those facts by the witness or witnesses named.

RULE 108.

The motion may be noticed and made at term before the court, or in vacation before the judge out of court: and only one commissioner will be named, unless special cause is shown for appointing a greater number, nor will costs be taxed for the services of more than one, except where both parties require a greater number.

RULE 109.

Interrogatories for the direct and cross examination, in case the parties disagree respecting them, shall be presented to the judge for his allowance at one time, and one day's notice of such reference shall be given by the party objecting to the opposite interrogatories.

RULE 110.

Cross-interrogatories shall be served within four days after the direct have been received, or they shall be regarded as assented to, and if no notice of reference to the judge is given within five days after both direct and cross-interrogatories have been served, each party shall be deemed to have assented to the interrogations served.

RULE 111.

The interrogatories, direct and cross, as agreed to by the parties or settled by the judge, shall be annexed to the commission.

RULE 112.

Directions as to the execution and return of the commission, signed by the clerk and the proctor of the party moving it or of both parties, if both unite in the commission, or if both propose interrogatories, shall accompany the commission.

RULE 113.

Depositions taken under commissions or otherwise, shall be forwarded to the clerk immediately after they are taken, and be filed on their return to the clerk's office in term or vacation and notice thereof shall be forthwith given by the party filing them to the proctor of the opposite party. And all objections to the form or manner in which they were taken or returned shall be deemed waived, unless such objections shall be specified in writing in four days after the same are opened, unless further time shall be granted by the judge.

RULE 114.

In suits between individuals, either party may at any time after the commissions or depositions are deposited with the clerk, enter an order of course as of a special sessions, if in vacation, to open the same and deliver copies thereof.

RULE 115.

In suits on seizures in which the United States are a party, such order may be entered on the written consent of the proctors or attorneys of the respective parties, or on motion to the court at a stated or special session.

RULE 116.

Opening such commissions or depositions shall not preclude either party from objecting to the competency or relevancy of the evidence when offered on trial.

RULE 117.

Exceptive allegations to the credibility or competency of witnesses examined on deposition or commission, may be filed within four days after the depositions or commissions are opened at the clerk's office, and notice shall be given forthwith of such exceptions.

RULE 118.

Testimony impeaching or supporting the witnesses may in such case be given by the parties respectively, on the hearing of the cause, and may be taken in the same manner as proofs in chief.

RULE 119.

Depositions *in perpetuam rei memoriam* to be used in this court, may be taken under a *dedimus potestatem*, or by any officer authorized by act of Congress to take depositions *de bene esse* to be used in the courts of the United States, in like cases and by like proceedings as is now authorized by the supreme court of the state of New-York.

RULE 120.

Notices of trial, argument or hearing, may be for any day in term, the court being then sitting, (including days to which the court may stand adjourned,) upon a sufficient excuse for not giving notice for the first day of the term.

RULE 121.

In all issues brought to trial, argument or hearing, except as provided in these Rules, four days previous notice shall be served on the attorney or proctor of the opposite party, when the attorney or proctor resides in this city; in all other cases, posting such notice conspicuously in the clerk's office shall be a sufficient service.

RULE 122.

A note of the pleadings and of the date of the issue shall be served on the clerk with a notice of the hearing four days before the time of hearing, and such notices shall also specify the pleadings and whatever papers or documents in his office shall be required by the parties to be produced by the clerk at the trial.

RULE 123.

So soon as issue is joined, the respondent or claimant may notice the cause for hearing on his part, and be thereupon entitled to a decree dismissing the same with costs or such other decree as the case may demand, unless the libellant shall also notice the cause for the same time, and proceed to trial or hearing or obtain a continuance by order of the court, on proper cause shown.

RULE 124.

When either party shall require *viva voce* testimony given in open court, to be taken down by the clerk pursuant to the act of congress, it shall be taken in the same manner as in jury trials on common law issues and not *verbatim* as in depositions *de bone esse.*

RULE 125.

The notes of the judge may by assent of parties be used as if taken down by the clerk.

RULE 126.

Either party desiring to diminish, vary or enlarge the minutes of proofs taken by the clerk or judge, may within two days after the trial, serve a statement of proofs on the proctor of the opposite party, and such statement if assented to, or if no amendments are proposed thereto within two days thereafter by such proctor, shall be regarded the true minute of the testimony given, and the notes of the judge or clerk be corrected in conformity thereto.

RULE 127.

If amendments are proposed and the parties do not agree therein, the statements and amendments shall be forthwith referred to the judge, and he shall settle or determine how the facts are, and the statement thus settled or adjusted shall be filed as the true minutes of the testimony given.

RULE 128.

In cases of demands, arising not *ex delicto*, on a decree in favor of the libellant by default or on hearing, it shall be referred to the clerk to compute and ascertain the amount due the libellant, but reference may also be made in cases of tort or on allegations of incidental or consequential damages, if desired by either party.

RULE 129.

In case of the absence of the clerk or his incompetency from interest or otherwise, or upon any sufficient cause shown, such reference may be made to assessors or otherwise, according to the course and custom of courts of civil and admiralty jurisdiction.

RULE 130.

On such reference either party may produce and use the pleadings and proofs filed in the cause or heard in court, and other competent proofs pertinent to the matter of reference.

RULE 131.

The clerk shall allow neither party longer than ten days from the order of reference to complete the proofs thereon without the special order of the judge.

RULE 132.

At the instance of either party the clerk shall report the additional testimony received by him and the offer of testimony rejected (if any) by him.

RULE 133.

Either party may except to the clerk's report and set down the exceptions for hearing, on two days' notice, at the first stated or special sessions after the report is filed.

RULE 134.

Upon the coming in of the report a decree of confirmation

may be entered on motion without notice, unless otherwise ordered by the court or the report shall be excepted to: and in the latter case, the exception shall be overruled or held abandoned, unless brought to a hearing the first stated or special sessions of the court for which it can be noticed.

RULE 135.

If the libellant takes no proceedings upon the report within four days after the filing thereof in open court, the respondent may move the court to dismiss the libel for want of due prosecution.

RULE 136.

If the promovent in a libel or information neglects to proceed in the cause with the despatch the course of the court admits, the respondent or claimant may have the libel or information dismissed on motion, unless the delay is by order of the judge or the act of the respondent or claimant.

RULE 137.

Four days' notice shall be given of the application to dismiss the action, and a copy of an affidavit or a certificate of the clerk, that no proceedings have been taken, be served at the same time.

RULE 138.

A special session of the court (besides the sittings on Tuesday each week) may be opened at any time *instanter* on the allowance of the judge, for hearing and disposing of special motions, arguments on questions of law, and also for taking proofs, or hearing admiralty and maritime or revenue causes and rendering interlocutory or final decrees therein.

RULE 139.

No party shall be compelled to take or meet proceedings at a special sessions, (without the order of the judge previously served on him,) in other than civil causes of admiralty and maritime jurisdiction.

RULE 140.

No special sessions will be held for the trial of jury causes, nor out of the city of New-York, without a special order of the court entered upon the minutes and published in a newspaper in the city of New-York, and also in one nearest the place where the court is to be held, (if out of the city,) at least fifteen days previous to such sitting.

RULE 141.

A guardian *ad litem* will be appointed on a petition, verified by oath, stating a proper case for such appointment; and the guardian shall give stipulations for costs, &c., the same as if he was personally the party in interest.

RULE 142.

Infants may sue by *prochein ami* to be first approved by the court; the *prochein ami* to give stipulations and be responsible for costs in the same manner, as the infant would be if of full age.

RULE 143.

Suits can only be prosecuted or defended *in forma pauperis* by express allowance of the court. In such case the pauper will be discharged of all stipulations or liabilities for costs.

RULE 144.

But the court on satisfactory proof of the inability of a party to comply with the usual stipulations in a cause, may mitigate and modify such stipulations conformably to the equities or exigencies of the case.

RULE 145.

Where proceedings on a decree shall not be stayed by an appeal, and the decree shall not be fulfilled or satisfied in ten days after notice to the proctor of the party against whom it shall be rendered, it shall be of course to enter an order that the sureties of such party cause the engagement of their

stipulation to be performed, or show cause in four days, or on the first day of jurisdiction afterwards, why execution should not issue against them, their lands, goods and chattels, according to their stipulation; and if no cause be then shown, due service having been made on the proctor of the party, a summary decree shall be rendered against them on their stipulations, and execution issue; but the same may be discharged on the performance of the decree and payment of all costs.

RULE 146.

A party obtaining a decree of the court, may at his election have for the execution thereof like process as is now used in this state for like purposes, except that of personal attachment as for a contempt of court.

RULE 147.

The writ of *fieri facias* or *venditione exponas* is adopted as final process in this court in all cases for the sale of property, and the proceedings thereon in admiralty cases shall be conformable to those on the common law side of the court.

RULE 148.

Whenever from the death of any of the parties or changes of interest in the suit, defect in the pleadings or proceedings, or otherwise, new parties to the suit are necessary, the persons required to be made parties may be made such either by a petition on their part or by the adverse party.

RULE 149

In either mode, it shall be sufficient to allege briefly the prayer of the original libel, the several proceedings in the cause and date thereof, and to pray that such persons required to be made parties to the suit may be made such parties.

RULE 150.

On service of a copy of such petition and of notice of the

presenting thereof, such order shall be made for the further proceeding in the cause as shall be proper for its speedy and convenient prosecution as to such new parties, and the same stipulations and security shall in all such cases be required and given, as in cases of persons becoming originally parties to a suit.

RULE 151.

A party shall not be held to enter his appeal from any decree or order of the court as final, unless the same is in a condition to be executed against him without further proceedings therein in court.

RULE 152.

Ten days from the time of rendering the decree shall be allowed to enter an appeal, within which time the decree shall not be executed. A brief notice in writing to the clerk and opposite proctor, that the party appeals in the cause shall be a sufficient entry of the appeal, without any petition to the court for leave to enter the same.

RULE 153.

When an appeal shall be entered, the appellant shall within ten days thereafter give security for damages and costs; and if security shall not be given within that time, the decree may be executed as if there had been no appeal, unless further time be allowed by the court.

RULE 154.

The appellant shall give four days' notice to the adverse party, or his proctor, of the person or persons proposed as his sureties with their additions and descriptions and of the time and place of giving the stipulation.

RULE 155.

When an appeal shall be entered the appellant shall cause the proceedings of the court required by law to be transmitted to the circuit court, to be transcribed for that purpose

within thirty days after the appeal shall be entered in this court: and in default thereof the decree shall be executed as if there had been no appeal, unless the court shall upon special motion of the appellant otherwise order.

RULE 156.

A rehearing will not be granted in any matter in which a decree has been rendered, unless application is made at the term when the decree is pronounced, or there is a stay of proceedings by order of the judge.

RULE 157.

No libel of review will be entertained in cases subject to appeal, nor unless filed before the enrolment of the decree or return of final process issued in the cause.

RULE 158.

When any moneys shall come to the hands of the marshal under or by virtue of any order or process of the court, he shall forthwith pay over the gross amount thereof to the clerk with a bill of his charges thereon, and a statement of the time of the receipt of the moneys by him, and upon the filing of such statements, and the taxation of such charges, the same shall be paid to the marshal out of such moneys; and the general account of all property sold under the order or decree of this court shall be returned by the marshal and filed in the clerk's office with the execution or other process under which the sale was made.

RULE 159.

All bills of costs and of charges to be paid under any order or decree of this court, shall be taxed and filed with the clerk before payment thereof: and if the same shall include charges for disbursements other than to the officers of the court, the proper and genuine vouchers or an affidavit therefor (in cases of loss of vouchers) shall be exhibited and filed, and if such bill shall be taxed without four days' notice to all parties concerned, they shall be subject to a retaxation of course

on application by any such party, not having had notice and at the charge of the party obtaining such taxation.

RULE 160.

The clerk is authorized to tax or certify bill of costs and to sign judgments, and also take acknowledgments of the satisfaction of judgments and all affidavits and oaths out of court as in open court in all cases where the same are not required by law to be taken in open court.

RULE 161.

In case of the absence of the clerk from the city or his inability to transact business, his deputy or chief clerk is authorized to sign judgments, to tax or certify all bills of costs in this court, other than those of the clerk, and also to affix the seal of the court and certify proceedings or papers in the name of the clerk in all other cases than exemplifications of the records or files of the court and perform duties appertaining to the clerk by appointment of the court, or the course of practice, which are not specifically appointed by statute to be performed by the clerk.

RULE 162.

The clerk is authorized to enter satisfaction of record of any judgment rendered in this court in behalf of the United States, on filing acknowledgment of satisfaction of the same duly made by the district attorney.

RULE 163.

All rules to which a party is entitled of course, or which are moved for upon the written consent of the parties, may be entered by the clerk in vacation without the mandate of the judge and be entitled as of a special court held on that day.

RULE 164.

Proctors of any circuit or district court of the United States, and attorneys of the supreme court of this state, and solicitors of the court of chancery, may be admitted attorneys and proctors of this court and counsellors of the said supreme

court and court of chancery, and counsellors and advocates of such circuit or district courts may be admitted counsellors and advocates of this court of course, upon taking the oaths prescribed by the constitution and laws of the United States.

RULE 165.

In admiralty and maritime causes wherein the matter in demand does not exceed fifty dollars, the proceedings for recovery thereof may be *summary*.

RULE 166.

Instead of filing a libel the promovent in suits by individuals may by short petition state the matter of his demand and the amount or value thereof, or present an account stated, or a bill of charges by items, on filing either of which, process may issue as on the filing of a libel in ordinary cases.

RULE 167.

The same petition or statement used on application for a summons pursuant to the act of Congress of July 20, 1799, sec. 6, shall when admiralty process is ordered by the judge or justice of the peace, be filed and may stand and be proceeded upon in lieu of the libel in form.

RULE 168.

Any party intervening may contest the petition on demand orally or in writing, by general denial or affirmance, or file a plea in bar or answer or claim.

RULE 169.

No costs shall be taxed the defendant, for any plea, answer or claim, other than a general issue to the actor's demand, unless an answer on oath be demanded.

RULE 170.

Either party may file interrogatories to be propounded to his adversary, which shall be answered on oath.

RULE 171.

The monition or citation or attachment may be made returnable the first day of a stated or special session of court next succeeding the service thereof,—at least three days intervening between the service and return of process *in rem* in suits by individuals and fourteen in suits by the United States:—and on the return of process in open court duly served, the cause may be put *instanter* upon the calendar, and either party without other notice may proceed therein to proofs and hearing. And the party obtaining a continuance of the cause, if *in rem*, shall bear all expenses taxed for keeping the thing attached, intermediate such continuance and the final hearing.

RULE 172.

The notices to be published in suits by individuals need contain only the title of the suit, the cause of action, the amount demanded, and the day and place of the return of the monition, and be subscribed with the name of the marshal and proctor of the libellant. No more than the usual printer's charge for advertisements of like size shall be taxed for the publication.

RULE 173.

In summary proceedings *in rem*, in behalf of the United States when the goods are under seizure by the collector and in his possession, the clerk, at the instance of the district attorney, may omit the attachment clause in the monition issued.

RULE 174.

If the monition also contains an attachment in such cases, and the marshal returns that the goods, &c. are in the custody of the collector, he shall stand acquitted of all responsibility for their safe keeping or production to answer the decree.

RULE 175.

In such case the service of the monition shall be by leaving a copy or notice thereof, with the collector or person

having the goods in keeping, and also making like service on the owner, or his agent, if known to the marshal and resident in the city.

RULE 176.

The costs to be taxed the district attorney, proctor and advocate on either side in a summary cause, shall not exceed twelve dollars.

RULE 177.

Fees shall not be taxed for more than one witness to prove the same facts, unless it appears that the witness was impeached or his testimony contradicted. No charges for serving writs of subpœna shall be taxed against the opposite party when the writ is executed by the marshal. If a witness does not attend after regular summons, proceedings to attachment may be had against him, without the service of a writ of subpœna.

RULE 178.

The provisions of the twelve preceding rules, are limited to those cases of admiralty and maritime jurisdiction, in which no appeal lies from this court to the circuit court.

RULE 179.

Summary proceedings in all respects not specified in the preceding rules are to be governed by the general course of procedure of the court.

PRACTICE IN INFORMATIONS.

RULE 180.

Informations on seizures upon land or water are to be drawn in a plain and concise form, only referring to, without reciting statutes or sections of statutes at large. The information should set forth the gravamen of the suit by plain and issuable allegations; and when *in rem* the property demanded as forfeited is to be specified, together with the alleged cause

of forfeiture. Informations are subject to the same general rules as to their structure and amendment as ordinary libels.

RULE 181.

Proceedings *in rem* for a forfeiture, and *in personam* for an offence, fine, penalty or debt, may be joined in one information, when having relation to the same transaction.

RULE 182.

On filing an information *in personam* or *in rem*, the clerk shall issue process thereon corresponding as nearly as may be with that employed in the instance court of admiralty in similar cases. But process *in personam* may be in the first instance a capias, or attachment against goods to compel an appearance, or a monition, at the election of the complainant.

RULE 183.

No party shall be held to bail on an information *in personam* without the mandate of the judge, except where bail is required or authorized by statute.

RULE 184.

All rules applicable to the service of, or proceedings in relation to process in plenary causes in admiralty, shall equally apply to process on informations.

RULE 185.

If the information filed is multifarious or ambiguous, or does not supply plain allegations upon which issue can be taken or a distinct reference to the statute upon which it is founded, the defendant or claimer may move the court to have it reformed, giving two days previous notice, together with a specification of the exceptive parts, to the district attorney or proctor in whose name it is filed. It may be amended of course in conformity to such notice: if not reformed within two days after pronounced defective by the court, the defendant may take an order of discharge from the action.

RULE 186.

Amendments may be had to informations in any stage of the cause; but if after an issue is formed between the parties, it shall be on payment of all costs which may have accrued by means of the amendment or the defective pleading.

RULE 187.

In informations *in rem*, a delivery on stipulation of property seized, or a sale of perishable articles may be had as in case of proceedings in the instance court of admiralty.

RULE 188.

The claimer shall appear and interpose his claim or plea on informations *in rem*, within the same time and in the same manner as in causes on the instance side of the court of admiralty; and shall appear and plead to informations *in personam* within the same time and in the same manner as in causes at common law: but no plea other than in abatement the general issue, former recovery, pardon or remission of the offence, fine or forfeiture, shall be received.

RULE 189.

Instead of a traverse of each separate cause of forfeiture alleged in the information, the defendant may plead as a general issue to an information *in rem* "that the several goods in the information mentioned did not, nor did any part thereof, become forfeited in manner and form as in the information in the behalf alleged."

RULE 190.

Putting in and justifying bail on behalf of the defendants on arrest, and the proceedings to and on trial and execution where a trial by jury must be had, shall be the same as in cases of common law jurisdiction.

COMMON LAW PRACTICE.

RULE 191.

Process commencing suits at common law, except on bail-

bonds, must be returnable at a stated term. In suits on obligations or agreements to pay money, damages may be claimed in the declaration, and judgment be taken, beyond the amount stated in the writ.

RULE 192.

When the capias has been served on the real party intended, the plaintiff before or after its return may amend of course any error in the name of the party inserted in the process, giving the defendant notice of such amendment: and when the real name is not known, process may be issued against the person by a fictitious name.

RULE 193.

When bail is not required, it shall be a sufficient service of the capias or other mesne process *in personam*, for the marshal to show such process to the defendant, or offer to show it, and at the same time leave with him a true copy thereof: in which case the marshal shall endorse his return "*personally served.*" The same rules and orders may be taken on filing such return, as if common bail had been filed, or the defendant had endorsed his appearance on such process.

RULE 194.

Bail shall not be exacted in actions of debt or informations on penal statutes, for a fine, penalty or forfeiture without the order of the judge endorsed on the process, except where otherwise provided by statute. To obtain the order it must be shown for cause, that the defendant is a transient person, or that there is reason to believe he is about to depart out of the jurisdiction of the court.

RULE 195.

In bailable suits in behalf of the United States, wherein the plaintiffs are entitled by any statutory provisions to have judgment entered at the return term of the writ, the district attorney may waive special bail and file common bail on the return of the writ and proceed to judgment accordingly.

RULE 196.

In the cases last specified, if the district attorney takes an assignment of the bail-bond, the writ may be issued thereon the first day of term, and be made returnable the same day, or any subsequent day in term or vacation.

RULE 197.

When special bail is required, it shall be put in and perfected on the return of the writ, in default whereof, a rule may be entered *instanter* that the marshal bring in the body of the defendant: but in such case if the defendant is arrested in this or the county of Kings, written notice of the intention to enter such rule shall be given the marshal two days previously, and six days, if the defendant is arrested in any other county of the district.

RULE 198.

All other proceedings in such causes shall be the same as in other common law actions in this court.

RULE 199.

In suits in which the United States shall be plaintiffs, or in which they shall be interested, though not plaintiffs, and in which the defendant shall be held to bail, the assignment of the bail-bond and the acceptance thereof, by the plaintiffs' attorney, shall not be deemed to preclude him from excepting to the sufficiency of the special bail; and the marshal shall become responsible for good bail in like manner as if the bail-bond had not been assigned and accepted as aforesaid.

RULE 200.

In recognisance of bail in civil suits, the sum for which the suit is instituted shall be expressed in the bail piece, and in suits where the sum demanded exceeds ten thousand dollars, two or more bail may justify for proportionate parts of such amount in sums to be determined by the judge.

RULE 201.

Bail desiring to surrender the principal, or the principal wishing to surrender himself in discharge of his bail, may give two days' notice in writing to the attorney of the plaintiff of the time and place of surrender.

RULE 202.

Two certified copies of the bail piece being produced to the judge, with proof of the due service of such notice, he will endorse on each a *committitur* of the principal to the custody of the marshal.

RULE 203.

On the written admission of the marshal, on due proof that the principal is in his custody under such *committitur*, and no sufficient cause being shown to the contrary, the judgewill immediately thereupon order an *exoneretur* to be entered.

RULE 204.

Such order and certified copy of the bail piece being filed, the clerk shall endorse an *exoneretur* on the bail piece, and also enter in the registry of bail the discharge thereof. An *exoneretur* may also be entered upon filing the written consent of the plaintiffs' attorney without an order of the judge.

RULE 205.

An immediate *committitur* before notice given, may be had on proof satisfactory to the judge that the principal is about to depart the district, or that the bail cannot with safety await the expiration of such notice, before a surrender is made.

RULE 206.

In such case the surrender shall be made in conformity to the present practice of this court, and may be made on the bail-bond, or by putting in special bail, before the return day of the writ.

RULE 207.

In case the defendant is held in custody out of this district n any gaol, the use of which shall have been ceded to the United States for the custody of prisoners, a surrender to the custody of the marshal of the district in which such gaol is situated may be made in the same manner as before designated; but such surrender shall be at the request of the bail alone.

RULE 208.

No plea shall be received in any suit instituted in this court upon a bond executed to the United States for the payment of duties or against persons accountable for public money, or in any suit instituted upon a bail-bond taken in consequence of such suit, unless such plea shall be accompanied by an affidavit of the truth of the matters in the said plea contained.

RULE. 209.

In suits in behalf of the United States, in which the plaintiffs are by statute entitled to judgment at the return term of the writ, the declaration may be filed in open court on the day the writ is returned; and proper proceedings may be thereon taken for perfecting judgment *instanter*, unless a plea is filed and a continuance of the cause allowed by the court.

RULE 210.

If the defendant pleads to any such suit, the district attorney may have the cause placed on the calendar of the same term, and may without other notice bring the same to trial when called, unless at the instance of the defendant, the court shall grant a continuance in the cause.

RULE 211.

Judgments by default in all cases in which the United States are plaintiffs, or are interested, may be entered up at any time in vacation as of the preceding term.

RULE 212.

The marshal, his deputies and all other persons concerned in the service of any process of this court, are respectively prohibited from becoming bail to the arrest in any suit depending in this court, and also for becoming special bail in any suit, unless for the purpose of surrendering the defendant; in which case the surrender shall be made within eight days after special bail shall be put in.

RULE 213.

In cases where the collector of the customs is entitled to receive the moneys in court, the same after deducting the costs shall be paid him by the clerk upon an order to be entered of course for that purpose.

RULE 114.

All commissions to examine witnesses shall be drawn and engrossed by the clerk, or shall be carefully examined and approved by him, and he shall be entitled to charge for the same as if drawn and engrossed by him.

RULE 215.

On filing every note of issue in common law causes and for all services not provided for by any law of the United States, the clerk shall be entitled to receive the same fees as are allowed at the time in the courts of this state for similar services, with the addition thereto allowed by the laws of the United States.

RULE 216.

The clerk shall before the first day of every stated term prepare two calendars, one for the use of the court and the other for the use of the bar, which calendars shall each be divided under two titles, the first containing the jury causes noticed for trial with the usual additions contained in the notes of issue filed, and the second containing the titles of all

admiralty suits and issues at law with the usual additions contained in the notices of trial filed with the said clerk.

RULE 217.

The clerk is prohibited from practising in this court, in all circumstances whatsoever.

RULE 218.

The bond required by law from the clerk shall be first recorded in a book to be kept in his office, and deposited in that bank in the city of New-York in which moneys in court are deposited, deliverable upon the order of the court to such person as the court may designate. The marshal's bond shall be filed and recorded in the clerk's office.

RULE 219.

All moneys paid into court by the officers thereof, or any other person or persons, in causes pending therein, shall be forthwith deposited by the clerk to the credit of the court in the bank in the city of New-York, which shall be designated on the minutes of this court as the bank for keeping the moneys of the court. No money so deposited shall be drawn from said bank, except by order of the judge in term or vacation, to be signed by the judge, and the order shall state the cause or causes in or on account of which it is drawn, and the same shall be entered on record.

RULE 220.

Whenever, after judgment or decree for a sum certain and before execution issued thereon, any party shall pay into court the amount thereof, together with the costs taxed: or whenever the marshal (or the proper officer) shall return process of execution *satisfied* and pay the amount of the judgment or decree and costs upon which such process issued into court, the clerk shall forthwith and without other authorization enter satisfaction of record of such judgment

or decree at the charge of the party in whose favor such judgment or decree may be rendered.

RULE 221.

The clerk's costs for entering satisfaction of judgment may be taxed in the first instance by the party obtaining the same.

RULE 222.

All checks for money to be drawn out of the bank in causes in which money is deposited, shall be drawn and signed by the clerk as clerk, and such check shall be written immediately under the order of the judge or on the same paper.

RULE 223.

The clerk shall exhibit to the court on the first day of each stated term, a full and particular statement or account of all moneys remaining therein, or standing to his credit as clerk subject to the order of the court, stating particularly on account of what causes such moneys are deposited, which account and the vouchers thereof shall be filed in court.

RULE 224.

The clerk shall provide a book in which he shall keep a full and particular account in each cause depending in the court of all moneys brought into court, and of the payment thereof; and such book and the accounts therein, shall at all times be open to the inspection and examination of the judge, the attorney of the United States and the marshal of the district: and any particular account shall also be open to the inspection of any person interested therein.

MISCELLANEOUS RULES.

RULE 225.

On an indictment found by the grand jury, the district attorney may forthwith sue out a *capias* or *attachment* under the seal of the court for the arrest and commitment of the

party indicted: such writ may also issue, if a defendant fails to appear pursuant to his recognisance given after indictment found.

RULE 226.

Where default is made by any party or witness bound by recognisance in any criminal proceeding, the clerk shall immediately issue a *scire facias* thereon.

RULE 227.

The amount of forfeited recognisances and all fines imposed and collected shall be paid into court, to be accounted for by the clerk with the United States' treasury.

RULE 228.

When a fine is imposed by the court on any person for any cause, and the party is not thereupon committed, and such fine is not discharged previous to the close of the term, the clerk shall issue to the marshal a warrant of execution, commanding him to levy and make such fine of the goods and chattels, or in default thereof of the lands and tenements of the party.

RULE 229.

Such fine may on application by the party and sufficient cause shown before payment of the same out of court into the treasury or otherwise, be mitigated or remitted at any term succeeding that in which it was imposed.

RULE 230.

In cases wherein the marshal of the district or his deputy is a party in interest, process shall be directed and delivered to the sheriff or under sheriff of the city and county of New-York for the time being, who are hereby, pursuant to the statute in such case made and provided, appointed to serve and execute such process.

RULE 231.

Special bail may be put in and filed, for the purpose of surrendering the principal before the return day of the writ.

RULE 232.

Bail to the arrest may surrender the principal or he may surrender himself in their exoneration, upon the bail-bond given on his arrest.

RULE 233.

Copies of the bail-bond certified by the marshal or his deputy, may be used for that purpose, in the same manner as certified copies of a bail piece.

RULE 234.

Proceedings against the marshal or any other officer of the court by attachment, and the filing of interrogatories for not returning the process of the court, is abolished.

RULE 235.

Every order for the marshal or other officer of the court, to show cause why an attachment shall not issue against him, shall state the true cause or ground upon which such attachment is demanded.

RULE 236.

On due service of a certified copy of such order, the party against whom it is entered shall be bound to appear on the first sitting of the court four days thereafter, and by affidavit filed in court, purge himself of every default or misfeasance in such order specified to the same extent as if he had answered to interrogatories framed thereon.

RULE 237.

If such officer fails in the judgment of the court, so purging himself, the court shall forthwith proceed against such officer, to commit him fully for contempt or otherwise, the same as if he had insufficiently answered interrogatories filed against him on his attachment.

RULE 238.

No writ of attachment shall issue in the first instance against any officer of this court, without the special mandate of the judge.

RULE 239.

All notices served on an agent or on attorneys or proctors residing out of the city and county of New-York, (and not having an office or place of business in this city, in Brooklyn or Williamsburgh,) shall be double the time ordinarily required.

RULE 240.

In all cases not provided for by the rules of this court, the rules of the circuit court of the United States for this district for the time being, (whether adopted before or after these rules,) so far as the same may be applicable, shall regulate the practice of this court: and when there is no rule of the circuit court to apply, then the rules of the supreme court of the state, now in force, so far as the same may be applicable, shall govern.

RULE 241.

The arrangement of rules under distinct heads of practice is not to prevent their governing every mode of procedure in court to which they may be applicable; but if differing provisions are adopted, the rules in collision are to be restricted each to the head of practice under which it may be classed.

PRIZE RULES.

RULE 1.

There shall be issued, under the seal and authority of this court, commissions to such persons as the court shall think fit, appointing them severally commissioners to take examinations of witnesses in prize causes in *preparatory*, on the standing interrogatories, which have been settled and adopted by this court, and all other depositions which they are empowered to require, and to discharge such other duties in relation to ships or vessels, or property brought into this district as prize, as shall be designated by the said commissioners and the rules and orders of this court.

RULE 2.

The captors of any property brought into this district as prize, or some one on their behalf, shall without delay give notice to the district judge, or to one of the commissioners aforesaid, of the arrival of the property, and of the place where the same may be found.

RULE 3.

Upon the receipt of notice thereof from the captors or district judge, a commissioner shall repair to the place where the said prize property then is; and if the same be a ship or vessel, or if the property be on board a ship or vessel, he shall cause the said ship or vessel to be safely moored in sufficient depth of water, or in soft ground.

RULE 4.

The commissioner shall, in case the prize be a ship or vessel, examine whether bulk has been broken; and if it be found that bulk has been broken, one of the said commissioners shall take information upon what occasion or what cause the same was done. If the property captured be not a

ship or vessel, or in a ship or vessel, he shall examine the chests, packages, boxes or casks containing the subject captured, and shall ascertain whether the same has been opened, and shall in every case examine whether any of the property originally captured has been secreted or taken away subsequently to the capture.

RULE 5.

The commissioner in no case shall leave the captured property until he secure the same by seals upon the hatches, doors, chests, bales, boxes, casks, or packages, as the case may require, so that they cannot be opened without breaking the said seals; and the said seals shall not be broken, or the property removed, without the special order of the court, excepting in case of fire and tempest, or of absolute necessity.

RULE 6.

If the captured property be not a vessel, or on board a vessel, the commissioner shall take a detailed account of the particulars thereof, and shall cause the same to be deposited under the seals as aforesaid, in a place of safety, there to abide the order or decree of this court.

RULE 7.

If no notification shall, within reasonable time, be given by the captors, or by any person in their behalf, of any property which may be brought as prize within this district, and the commissioners, or either of them, shall become informed thereof, by any means, it shall be the duty of the said commissioners, or one of them, to repair to the place where such property is, and to proceed in respect to the same, as if notice had been given by the captors.

RULE 8.

The captor shall deliver to the judge at the time of such notice or to the commissioner or commissioners, when he or they shall conformably to the foregoing rule repair to the place where such captured property is, or at such other time

as the said commissioners, or either of them, shall require the same, all such papers, passes, sea-briefs, charters, bills of lading, cockets, letters and other documents and writings as shall have been found on board the captured ship, or which have any reference to, or connection with the captured property, and which are in the possession, custody, or power of the captors.

RULE 9.

The said papers, documents and writings shall be regularly marked and numbered by a commissioner, and the captor, chief officer, or some other person who was present at the taking of the prize, and saw that such documents, papers and writings were found with the prize, must make a deposition before one of the said commissioners that they have delivered up the same to the judge or commissioner as they were found or received, without any fraud, subduction or embezzlement. If any documents, papers or writings, relative to or connected with the captured property are missing or wanting, the deponent shall, in his said deposition, account for the same according to the best of his knowledge, information and belief.

RULE 10.

The deponent must further swear, that if at any time thereafter, and before the final condemnation or accquittal of the said property, any further or other papers relating to the said captured property shall be found or discovered, to the knowledge of the deponent, they shall also be delivered up, or information thereof given to the commissioners or to this court, which deposition shall be reduced to writing by the commissioner, and shall be transmitted to the clerk of the court as hereinafter mentioned.

RULE 11.

When the said documents, papers and writings are delivered to a commissioner, he shall retain the same till after the examination in *preparatorio* shall have been made by him, as is hereafter provided, and then he shall transmit the same

with the same affidavit in relation thereto, the preparatory examinations, and the information he may have received in regard to the said captured property, under cover and under his seal to this court, addressed to the clerk thereof, and expressing on the said cover to what captured property the documents relate, or who claim to be the captors thereof, or from whom he received the information of the capture, which said cover shall not be opened without the order of the court.

RULE 12.

Within three days after the captured property shall have been brought within the jurisdiction of this court, the captor shall produce to one of the commissioners, three or four, if so many there be of the company or persons who were captured with, or who claim the said captured property, and in case the capture be a vessel, the master and mate or supercargo, if brought in, must always be two, in order that they may be examined by the commissioner *in preparatory*, upon the standing interrogatories.

RULE 13.

In the examination of witness *in preparatorio*, the commissioner shall use no other interrogatories but the standing interrogatories, unless special interrogatories are directed by the court. He shall write down the answer of every witness separately to each interrogatory, and not to several interrogatories together; and the parties may personally or by their agents attend the examination of witnesses before the commissioners: but they shall have no right to interfere with the examination by putting questions or objecting to questions: all objections to the regularity or legality of the proceedings of the commissioners must be made to the court.

RULE 14.

When a witness declares he cannot answer to any interrogatory, the commissioner shall admonish the witness that by virtue of his oath taken to speak the truth, and nothing but the truth, he must answer to the best of his knowledge, or

when he does not know absolutely, then to answer to the best of his belief concerning any one fact.

RULE 15.

The witnesses are to be examined separately, and not in presence of each other, and they may be kept from all communication with the parties, their agents or counsel, during the examination. The commissioners will see that every question is understood by the witness, and will take their exact, clear and explicit answers thereto: and if any witness refuses answer at all, or to answer fully, the examining commissioner is forthwith to certify the fact to the court.

RULE 16.

The captors must produce all their witnesses in succession, and cannot, after the commissioners have transmitted the examination of a part of the crew to the judge, be allowed to have others examined without the special order of the court: and the examination of every witness shall be begun, continued and finished in the same day, and not at different times. Copies of the standing interrogatories shall not be returned by the commissioner with the examinations, but it shall be sufficient for the answer of the witnesses to refer to the standing interrogatories by corresponding numbers.

RULE 17.

Before any witness shall be examined on the standing interrogatories the commissioner shall administer to him an oath in the following form: "You shall true answer make to all such questions as shall be asked of you on these interrogatories, and therein you shall speak the whole truth, and nothing but the truth, so help you God." If the witness is conscientiously averse to swearing, an affirmation to the same effect shall be administered to him.

RULE 18.

Whenever the ship's company, or any part thereof, of a captured vessel, are foreigners, or speak only a foreign lan-

guage, the commissioner taking the examination may summon before him competent interpreters, and put to them an oath well and truly to interpret to the witness the oath administered to him and the interrogations propounded, and well and truly to interpret to the commissioners the answers given by the witness to the respective interrogatories.

RULE 19.

The examination of each witness on the standing interrogatories shall be returned according to the following form: "Deposition of A. B. a witness produced, sworn and examined *in preparatorio* on the day of in the year at the house of on the standing interrogatories established by the district court of the United States, for the southern district of New-York. The said witness having been produced for the purpose of such examination by C. D. in behalf of the captors of a certain ship or vessel called the (or of certain goods wares and merchandise as the case may be.)

1st. To the first interrogatory, the deponent answers that he was born at &c.

2d. To the second interrogatory the deponent answers that he was present at the time of the taking, &c."

RULE 20.

When the interrogatories have all been answered by a witness, he shall sign his deposition, and the commissioner shall put a certificate thereto in the usual form, and subscribe his name to the same.

RULE 21.

No person having or claiming any interest in the captured property, or having any interest in any ship having letters of marque or commissions of war, shall act as a commissioner. Nor shall a commissioner act either as proctor, advocate or counsel either for captors or claimants in any prize cause whatever.

RULE 22.

If the captain or prize-master neglect or refuse to give up and deliver to the commissioners the documents, papers and writings relating to the captured property according to these rules; or refuse or neglect to produce, or cause to be produced, witnesses to be examined *in preparatory*, within three days after the arrival of the captured property within the jurisdiction of this court, or shall otherwise unnecessarily delay the production of the said documents, papers or writings, the commissioners, or one of them nearest to the place where the captured property may be, or before whom the examination *in preparatorio* may have been already begun, shall give notice in writing to the delinquent to forthwith produce the said documents, papers and writings, and to bring forward his witnesses, and if he shall neglect or delay so to do for the period of twenty-four hours thereafter, such commissioner shall certify the same to this court, that such proceedings may therefore be had as justice may require.

RULE 23.

If within twenty four hours after the arrival within this district, of any captured vessel, or of any property taken as prize, the captors or their agent shall not give notice to the judge or a commissioner pursuant to the provisions herein made, or shall not, two days after such notice given, produce witnesses to be examined *in preparatorio*, then any person claiming the captured property and restoration thereof, may give notice to the judge or the commissioners as aforesaid, of the arrival of the said captured property, and thereupon such proceedings may be had by the commissioners in respect to the said property, and relative to the documents, papers and writings connected with the said capture, which the claimant may have in his possession, custody or power, and relative to the examination of witnesses *in preparatorio* as near as may be, as is before provided for in cases where the captors shall give notice and examine *in preparatorio*. And the said claimant may in such cases file his libel for restitution, and proceed thereon according to the rules and practice of this court.

RULE 24.

As soon as may be convenient after the captured property shall have been brought within the jurisdiction of this court, a libel may be filed, and a monition shall thereupon be issued, and such proceedings shall be had as are usual in conformity to the practice of this court in cases of vessels, goods, wares and merchandise seized as forfeited in virtue of any revenue law of the United States.

RULE 25.

In all cases by consent of captor and claimant, or upon attestation exhibited upon the part of the claimant only, without consent of the captor, that the cargo or part thereof is perishing or perishable, the claimant specifying the quantity and quality of the cargo, may have the same delivered to him on giving bail to answer the value thereof if condemned, and further to abide the event of the suit, such bail to be approved of by the captor, or otherwise the persons who give security, swearing themselves to be severally and truly worth the sum for which they give security. If the parties cannot agree upon the value of the cargo, a decree or commission of appraisement may issue from the court to ascertain the value.

RULE 26.

In cases where there is no claim, an affidavit being exhibited on the part of the captor of such perishing or perishable cargo, specifying the quantity and quality thereof, the captor may have a decree or commission of appraisement and sale of such cargo, the proceeds thereof to be brought into court, to abide the further orders of the court.

RULE 27.

The name of each cause shall be entered by the clerk upon the calendar for hearing in their order, according to the dates of the returns of the monitions, and lists of the causes ready for hearing are to be constantly hung up in the court room and clerk's office for public inspection.

RULE 28.

In all cases where a decree or commission of appraisement and sale of any ship and cargo, or either of them, shall have issued, no question respecting the adjudication of such ship and goods, or either of them, as to freight or expenses, shall be heard till the said decree or commission shall be returned, with the account of sales, and the proceeds according to such account of sales be paid into court, to abide the order of the court in respect thereto.

RULE 29.

After the examination taken *in preparatory* on the standing interrogations are brought into the clerk's office, and the monition has issued, no further or other examinations upon the said interrogatories shall be taken, or affidavits received, without the special directions of the judge upon due notice given.

RULE 30.

None but the captors can, in the first instance, invoke papers from one captured vessel to another, nor can it be done without the special mandate of the judge; and in case of its allowance, only extracts from the papers are to be used.

RULE 31.

The invocation shall only be allowed on affidavit on the part of the captors, satisfying the court that such papers are material and necessary.

RULE 32.

Application for permission to invoke must be on service, at least two days previously, of notice thereof, and copy of the affidavit on the claimants or their agent, (if known to be in this port,) and after invocation allowed to the captors, the claimants, by permission of the judge, for sufficient cause shown, may use other extracts of the same papers in explanation of the parts invoked.

RULE 33.

But when the same claimants intervene for different vessels or for goods, wares or merchandise, captured on board different vessels, and proofs are taken in the respective causes, and the causes are on the dockets for trial at the same time, the captors may, on the hearing in court, invoke of course in either of such causes the proofs taken in any other of them: the claimants, after such invocation, having liberty to avail themselves also of the proofs in the cause invoked.

RULE 34.

In all motions for commissions and decrees of appraisement and sale, the time shall be specified within which it is prayed that the commissions or decrees shall be made returnable.

RULE 35.

The commissioners shall make regular returns on the days in which their commission or decrees are returnable, stating the progress that has been made in the execution of the commission or decrees, and if necessary, praying an enlargement of the time for the completion of the business.

RULE 36.

The commissioners shall bring in the proceeds which have been collected at the time of their returns; and they may be required from time to time to make partial returns of such sums only as are necessary to cover expenses.

RULE 37.

On the returns of commissions or decrees, the commissioners or the marshal must bring in all the vouchers within their control.

RULE 38.

All moneys brought into court in prize causes, shall be forthwith paid into such Bank in the City of New-York as shall be appointed for keeping the moneys of the court, and shall only be drawn out on the specific orders of the court

in favor of the persons respectively having right thereto, or their agents or representatives duly authorized to receive the same.

RULE 39.

At every stated term of the court, the clerk shall exhibit to the court a statement of all the moneys paid into court in prize cases, designating the amount paid in each particular case, and at what time.

RULE 40.

The statement when approved by the court, shall be filed of record in the clerk's office, and be open to the inspection of all parties interested, and certified copies thereof shall be furnished by the clerk, on request, to any party in interest, his proctor or advocate.

RULE 41.

When property seized as prize of war is delivered upon bail, a stipulation according to the course of the admiralty is to be taken for double its value.

RULE 42.

Every claim interposed must be by the parties in interest if within convenient distance; or in their absence by their agent or the principal officer of the captured ship, and must be accompanied by a test affidavit, stating briefly the facts respecting the claim and its verity, and how the deponent stands connected with or acquired knowledge of it. The same party who may intervene is also competent to attest to the affidavit.

RULE 43.

The captors of property brought in or held as prize, or which may have been carried into a foreign port, and there delivered upon bail by the captors, shall forthwith libel the same in fact, and sue out the proper process. The first process may, at the election of the party, be a warrant for the

arrest of the property or person to compel a stipulation to abide the decree of the court, or a monition.

RULE 44.

The monitions shall be made returnable in twenty days, and if the property seized as prize is in port, shall be served in the same way as in the case of monitions issued on the instance side of the court of admiralty on seizures for forfeiture under the revenue laws. In case the property claimed as prize is not in port, then the monition is to be served on the parties in interest, their agent or proctor if known to reside in the district, otherwise by publication daily in one of the newspapers of this city for fifteen successive days preceding the return thereof.

RULE 45.

Whenever the jurisdiction of the court is invoked upon matters as incident to prize, except as to the distribution of prize money, there must be distinct articles or allegations in that behalf in the original libel or claim on the part of the party seeking relief. But in case the matters have arisen, or become known to the party subsequent to presenting his libel or claim, the court will allow him to file the necessary amendments.

RULE 46.

No permission will be granted to either party to introduce further proofs until after the hearing of the cause upon the proofs originally taken.

RULE 47.

In case of captures by the public armed vessels of the United States, and a proceeding for condemnation against the property seized as prize *jure belli*, or in the nature of prize of war, under any act of Congress, the name of the officer under whose authority the capture was made must be inserted in the libel.

RULE 48.

A decree of contumacy may be had against any party not obeying the orders or process of the court, duly served upon him; and thereupon an attachment may be sued out against him. But no constructive service of a decree or process, *viis et modis*, or *publica citatio* will be sufficient, unless there has been a publication thereof in a daily paper in this city, at least fifteen days immediately preceding the motion for an attachment.

RULE 49.

When damages are awarded by the court, the party entitled thereto may move for the appointment of three commissioners to assess the same; two persons approved by the court will thereupon be associated with the clerk or deputy clerk of this court if not interested in the matter, whose duty it shall be to estimate and compute the damages in conformity to the principles of the decree, and return a specific report to the court of the amount of damages, and the particular items of which they are composed.

RULE 50.

Any party aggrieved may have such assessment of damages reviewed in a summary manner by the court before final decree rendered thereon, on giving two days' previous notice to the proctor of the party in whose favor the assessment is made, of the exceptions he intends taking, and causing to be brought before the court the evidence given the commissioners in relation to the particular excepted to.

RULE 51.

Every appeal from the decrees of this court must be made within ten days from the time the decree appealed from is entered, otherwise the party entitled thereto may proceed to have it executed. No appeal shall stay the execution of a decree unless the party, at the time of entering the appeal, gives a

stipulation with two sureties to be approved by the clerk in the sum of two hundred and fifty dollars, to pay all costs and damages that may be awarded against him, and to prosecute the appeal to effect.

RULE 52.

If the party appealing is afterwards guilty of unreasonable delay in having the necessary transcripts and proceedings prepared for removing the cause, it will be competent to the other party to move the court for leave to execute the decree notwithstanding the appeal.

RULE 53.

In all cases of process *in rem* the property after arrest is deemed in the custody of the court, and the marshal cannot surrender it on bail, or otherwise, without the special order of the court.

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ADVOCATES' FEES.

Retaining fee,	$3,75
Perusing, examining and signing a libel, answer, special pleading, interrogatories or exceptions, when the advocate is not the proctor in the cause,	1,25
Attendance in court on every necessary proceeding in a cause,	62½
Arguing in court on any special motion actually litigated,	1,25
Arguing every special plea, demurrer or exceptions, actually litigated,	2,50
Arguing on final hearing, on pleadings and proofs, when the cause is litigated on the merits and in no other case,	5,00
Attending a judge or commissioner on taking testimony *de bene esse* out of court, but no allowance for more than one attendance,	5,00
Attendance before the clerk or assessors on reference by order of the court, but no allowance for more than one attendance,	3,00
No fees taxed for more than one advocate in the same cause.	

PROCTORS' FEES.

Retaining fee; (but when the same person acts both as advocate and proctor, no retaining fee allowed as proctor,)	3,75
Drawing libel, plea, answer, claim, exceptions, necessary affidavits, &c., each folio of 100 words,	25

Copy same for each folio,	12½
Every necessary motion made in court,	62½
Attendance in court on every necessary proceeding in a cause, (not being the advocate,)	62½
Drawing interrogatories each folio of 100 words,	25
Copy same per folio,	12½
[But taxation is never to exceed $2,50 for draft, and $1,50 for copy of interrogatories.]	
Brief on special motion or petition argued in court on both sides,	1,12½
Brief on final argument in court upon the merits,	2,50
[These briefs to include all abbreviations of pleadings, proofs, &c., and no separate allowances made therefor.]	
Attending judge or commissioner on taking testimony *de bene esse* out of court, (if not the advocate,)	5,00
Attending clerk or assessors on reference and computation of damages, (if not the advocate,)	3,00
[But no more than one attendance taxed in either of the two last cases.]	
Attending taxation of costs, when notice thereof has been given or received,	50
Copy of bill of costs for opposite party,	37½
Every necessary notice actually given,	37½
Arguing a motion or cause in court, (if not the advocate, and if the charge is not taxed for an advocate in the cause.)	1,25